

NEBRASKA

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Pete Ricketts, Governor

**Authorization to Discharge Under the
National Pollutant Discharge Elimination System
(NPDES)**

This NPDES permit is issued in compliance with the provisions of the Federal Water Pollution Control Act (33 U.S.C. Secs. 1251 *et. seq.* as amended to date), the Nebraska Environmental Protection Act (Neb. Rev. Stat. Secs. 81-1501 *et. seq.* as amended to date), and the Rules and Regulations promulgated pursuant to these Acts. The facility and outfall(s) identified in this permit are authorized to discharge wastewater and are subject to the limitations, requirements, prohibitions and conditions set forth herein. This permit regulates and controls the release of pollutants in the discharge(s) authorized herein. This permit does not relieve permittees of other duties and responsibilities under the Nebraska Environmental Protection Act, as amended, or established by regulations promulgated pursuant thereto.

NPDES Permit No.: **NE0113646**
IIS File Number: **58027**
Facility Name: **Platte Generating Station**
Permittee: **City of Grand Island**
Facility Address: **1035 West Wildwood Drive, Grand Island, NE 68801**
Mailing Address: **PO Box 1968, Grand Island, NE 68802-1968**
Legal Description: **N ½, Section 9, Township 10 N, Range 9 E, Hall County, NE**
Latitude/Longitude: **40.855° North / 98.3486° West**
Receiving Water: **Platte River (MP2-10000 of the Middle Platte River Basin)**
Effective Date: **October 1, 2017**
Expiration Date: **September 30, 2022**

Pursuant to a Delegation Memorandum dated August 22, 2016, and signed by the Director, the undersigned hereby executes this document on behalf of the Director.

Signed this 19th day of September, 2017


Shelley Schneider
Water Permits Division Administrator



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USCA Case #17-1193
 Platte Generating Station
 NPDES Permit No. NE0113646

Document #1720468

Filed: 03/02/2018

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Part I. Effluent Limits and Monitoring Requirements

A. Outfall LV01 – Low Volume Wastewater

The discharge from internal Outfall LV01 to the settling pond consists of low volume amounts of water from equipment drains and floor drains. Effluent discharge through Outfall LV01 is authorized and shall be monitored and limited as set forth in Table 1 below.

Table 1: Discharge Limits and Monitoring Requirements for Outfall LV01						
Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Monthly Average	Daily Maximum		
Total Suspended Solids	00530	mg/L	30.0	100.0	Quarterly	Grab
Oil and Grease	00552	mg/L	15.0	20.0	Quarterly	Grab
Flow	50050	MGD	Report	Report	Daily	Calculated or Metered
Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Daily Minimum	Daily Maximum		
pH	00400	S.U.	6.0	9.0	Quarterly	Grab ^(a)
Footnotes: (a) Analysis shall occur within 15 minutes of sample collection. Abbreviations: S.U. – Standard Units; mg/L – milligrams per liter; MGD – million gallons per day						

B. Outfall BA01 – Bottom Ash Transport Water

The discharge from internal Outfall BA01 to the settling pond consists of bottom ash transport water. Effluent discharge through Outfall BA01 is authorized and shall be monitored and limited as set forth in Table 2 below.

Outfall BA01 may not discharge pollutants to the settling pond after the date set forth in Part II of the permit. Any wastewater in the pond containing bottom ash transport water that was discharged into the Settling Pond prior to that date shall be treated as legacy wastewater and shall be subject to the limitations below.

Table 2: Discharge Limits and Monitoring Requirements for Outfall BA01

Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Monthly Average	Daily Maximum		
Total Suspended Solids	00530	mg/L	30.0	100.0	Quarterly	Grab
Oil and Grease	00552	mg/L	15.0	20.0	Quarterly	Grab
Flow	50050	MGD	Report	Report	Daily	Calculated or Metered
Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Daily Minimum	Daily Maximum		
pH	00400	S.U.	6.0	9.0	Quarterly	Grab ^(a)
Footnotes: (a) Analysis shall occur within 15 minutes of sample collection. Abbreviations: S.U. – Standard Units; mg/L – milligrams per liter; MGD – million gallons per day						

C. Outfall CP01 – Coal Pile Runoff Water

Wet weather events may result in runoff from the facility coal pile being discharged through Outfall CP01 to the settling pond. Effluent discharge through Outfall CP01 is authorized and shall be monitored and limited as set forth in Table 3 below.

Table 3: Discharge Limits and Monitoring Requirements for Outfall 002						
Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Monthly Average	Daily Maximum		
Total Suspended Solids	00530	mg/L	Report	50.0 ^(b)	Quarterly	Grab
Flow	50050	MGD	Report	Report	Daily	Calculated or Metered
Duration of Flow	81381	Hours	Report		Quarterly	Calculated
Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Daily Minimum	Daily Maximum		
pH	00400	S.U.	6.0	9.0	Quarterly	Grab ^(a)
Footnotes: (a) Analysis shall occur within 15 minutes of sample collection. (b) Any untreated overflow from facilities designed, constructed, and operate to treat the volume of coal pile runoff, which is associated with a 10 year, 24-hour rainfall event shall not be subject to TSS limitation.						
Abbreviations: S.U. – Standard Units; mg/L – milligrams per liter; MGD – million gallons per day						

D. Outfall CT01 – Cooling Tower Blowdown

The discharge for internal Outfall CT01 consists of categorical cooling tower blowdown wastewater to the settling pond. The discharge from Outfall CT01 is authorized and shall be monitored and subject to the limits set forth in Table 4 below. No other classes of categorical wastestreams or noncategorical dilution wastestreams shall be present in the effluent from Outfall CT01 during sample collection.

Table 4: Discharge Limits and Monitoring Requirements for Outfall CT01

Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Monthly Average	Daily Maximum		
Flow	50050	MGD	Report	Report	Daily	Calculated or Metered
Total Chromium	01034	mg/L	0.2	0.2	Annually	Grab
Total Zinc	01092	mg/L	1.0	1.0	Annually	Grab
Priority Pollutants ^(b)	50008	mg/L	Report ^(c)	Report ^(c)	Annually	Grab
Free Available Chlorine ^(d)	50064	mg/L	0.2 ^(e)	0.5	Quarterly	Grab
Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Daily Minimum	Daily Maximum		
pH	00400	S.U.	6.0	9.0	Quarterly ^(a)	Grab

Footnotes:

- (a) Analysis shall be conducted within 15 minutes of sample collection.
- (b) Compliance with the limitations for the 126 priority pollutants may be determined by engineering calculations instead of a chemical analysis, which demonstrate that the regulated pollutants are not detectable in the final discharge by the analytical methods in 40 CFR Part 136. The engineering calculations are based on the chemicals added for cooling tower maintenance. See 40 CFR Part 423 Appendix A for a list of the priority pollutants.
- (c) No detectable amounts are permitted for any of the priority pollutants in the final discharge, except for chromium and zinc, using the analytical methods of 40 CFR Part 136.
- (d) Neither free available chlorine or total residual chlorine may be discharged from any unit for more than two hours in any one day and not from more than one unit in the plant at any one time unless Platte Generating Station can demonstrate to the NDEQ that the units in a particular location cannot operate at or below this level of chlorination. The term free available chlorine shall mean the value obtained using the amperometric titration method for free available chlorine described in *Standard Methods for the Examination of Water and Wastewater*, page 112 (13th Edition).
- (e) The average concentration means the average of analyses made over a single period of chlorine release which does not exceed two hours.

Abbreviations: S.U. – Standard Units; mg/L – milligrams per liter; MGD – million gallons per day
µmh/cm – microohms per centimeter

E. Outfall MC01 – Discharge from Metal Cleaning

The discharge from metal cleaning through internal Outfall MC01 is authorized and shall be monitored and subject to the limits set forth in Table 5 below. The metal cleaning wastewater may be discharged to the settling pond. Samples from MC01 shall be taken prior to discharge and before comingling with any other classes of categorical wastestreams or non-categorical dilution water.

Table 5: Limits and Monitoring Requirements for Outfall MC01

Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Monthly Average	Maximum		
Flow	50050	MGD	Report	Report	Semiannually	Calculated or Metered
Oil and Grease	00552	mg/L	15.0	20.0	Semiannually	Grab
Total Suspended Solids	00530	mg/L	30.0	100.0	Semiannually	Grab
Total Copper	01119	mg/L	1.0	1.0	Semiannually	Grab
Total Iron	01045	mg/L	1.0	1.0	Semiannually	Grab
Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Daily Minimum	Daily Maximum		
pH	00400	S.U.	6.0	9.0	Semiannually ^(a)	Grab
Footnotes: (a) Analysis shall occur within 15 minutes of sample collection. Abbreviations: S.U. – Standard Units; mg/L – milligrams per liter; MGD – million gallons per day						

F. Outfall 001 – Discharge of Wastewater from Settling Pond

Wastewater from low volume sources, bottom ash transport settling water, coal pile runoff, metal cleaning wastewater, and cooling tower blowdown is discharged to the settling pond. The discharge of wastewater from the settling pond through Outfall 001 to the Platte River (MP2-10000) is authorized. The wastewater discharged through Outfall 001 must be consistent with the description provided in the permit application and any supplemental information submitted used in the development of this permit and shall be monitored and subject to the limits set forth below in Tables 6, 7, and 8.

The settling pond may not receive any bottom transport water after the date set forth in Part II of the permit. Any wastewater in the pond containing bottom ash transport water that was discharged into the Settling Pond prior to that date shall be treated as legacy wastewater and shall be subject to the limitations below.

Table 6: Discharge Limits and Monitoring Requirements for Outfall 001

Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Monthly Average	Daily Maximum		
Flow	50050	MGD	Report	Report	Daily	Calculated or Metered
Temperature	00011	°F	Report	90.0	Daily	Measured ^(a)
Total Suspended Solids	00530	mg/L	30.0	100.0	Monthly	Grab
Oil and Grease	00552	mg/L	Report	10.0	Monthly	Grab
Parameter	Storet #	Units	Requirements		Monitoring Frequency	Sample Type
Pollution Scan ^(c)	51168	Yes = 1 No = 0	Report		Once per permit term	Grab
Parameter	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Daily Minimum	Daily Maximum		
pH	00400	S.U.	6.5	9.0	Monthly	Grab ^(a)

Footnotes:

(a) Analysis shall occur within 15 minutes of sample collection.

(b) Toxicity shall be measured using the Whole Effluent Toxicity (WET) test procedures set forth in 40 CFR Part 136. See Attachment 1 for Guidance for Conducting Toxicity Testing and TIE/TRE Studies.

(c) Pollution scan requirements are detailed in Attachment 2. If a pollution scan is conducted this monitoring period, enter 1 on the DMR. If it was not conducted during this period, enter 0.

Abbreviations: S.U. – Standard Units; mg/L – milligrams per liter; MGD – million gallons per day °F – degrees Fahrenheit

G. Outfall 001 – Seasonal Requirements

The discharge of wastewater from the settling pond from Outfall 001 to the Platte River is authorized. The discharge must be consistent with the description provided in the permit application and any supplemental information submitted used in the development of this permit. The discharge from Outfall 001 shall be monitored and subject to the limits set forth below in Table 7.

Table 7: Seasonal Discharge Limits and Monitoring Requirements for Outfall 001

Parameters	Storet #	Units	Discharge Limits		Monitoring Frequency	Sample Type
			Monthly Average	Daily Maximum		
Spring Total Residual Chlorine (TRC) (March 1 – May 31)	50060	mg/L	0.029	0.041	Monthly ^(a)	Grab ^(b)
Summer Total Residual Chlorine (TRC) (June 1 – Oct. 31)	50060	mg/L	0.010	0.020	Monthly ^(a)	Grab ^(b)
Winter Total Residual Chlorine (TRC) (Nov. 1 – Feb. 28[29])	50060	mg/L	0.011	0.021	Monthly ^(a)	Grab ^(b)
Conductivity	00094	µmhos/cm	Report	Report	Quarterly	Grab
Acute Toxicity – <i>Ceriodaphnia sp</i>	61425	TUa	Report	1.0	Annually ^(c)	Grab ^(d)
Acute Toxicity – <i>Pimephales promelas</i>	61427	TUa	Report	1.0	Annually ^(c)	Grab ^(d)

Footnotes:

- (a) If chlorine is not used for disinfection, monitoring is not required (NODI Code 9, monitoring condition not required).
 (b) Analysis shall occur within 15 minutes of sample collection.
 (c) Annual sampling is required. Sampling will be conducted seasonally. Therefore, at least one annual sample will be taken in spring (March 1 – May 31), at least one annual sample in summer (June 1 – October 31), and at least one sample in winter (November 1 – February 28[29]).
 (d) Toxicity shall be measured using the Whole Effluent Toxicity (WET) test procedures set forth in 40 CFR Part 136. See Attachment 1 for Guidance for Conducting Toxicity Testing and TIE/TRE Studies.

Abbreviations: µmhos/cm – microohms per centimeter mg/L – milligrams per liter; TUa – acute toxicity units

H. Outfall 001 – Dissolved Metals Monitoring from the Settling Pond

The discharge of wastewater from the settling pond from Outfall 001 to the Platte River is authorized. The discharge must be consistent with the description provided in the permit application and any supplemental information submitted used in the development of this permit. The discharge from Outfall 001 shall be monitored and subject to the limits set forth below in Table 8.

Table 8: Dissolved Metals Monitoring Requirements for Outfall 001

Parameters ^(a)	Storet #	Units	Discharge Limits	Monitoring Frequency	Sample Type
Dissolved Cadmium	01025	mg/L	Report	Annually	Grab
Dissolved Chromium	01030	mg/L	Report	Annually	Grab
Dissolved Copper	01040	mg/L	Report	Annually	Grab
Dissolved Iron	01046	mg/L	Report	Annually	Grab
Dissolved Lead	01049	mg/L	Report	Annually	Grab
Dissolved Nickel	01065	mg/L	Report	Annually	Grab
Dissolved Zinc	01090	mg/L	Report	Annually	Grab
Dissolved Mercury	71890	µg/L	Report	Annually	Grab

Footnotes:

(a) The analytical procedure used for the determination of metals limits must be sufficiently sensitive to provide accurate results to 0.010 mg/L except for mercury where the analytical procedure used must be sufficiently sensitive to provide accurate results to 0.02 µg/L.

Abbreviations: µg/L – micrograms per liter mg/L – milligrams per liter

Part II. Steam Electric Power Generating Point Source Effluent Limitation Guidelines

Upon issuance of this permit, the City of Grand Island shall implement the compliance schedule set forth below for meeting final permit requirements regarding the elimination of pollutants in bottom ash transport water as set forth by the new regulations promulgated in 40 CFR Part 423 on November 3, 2015. This schedule may be modified in accordance with NDEQ Title 119 and written notice from the NDEQ.

Annually

The City of Grand Island shall send an annual update to NDEQ progress that has occurred to achieve the requirements of this compliance schedule. This update may include information such as planning upgrades to the facility wastewater system, steam electric generating process changes, or other data which will result in the establishment of BAT limitations.

December 31, 2023

No later than December 31, 2023, the City of Grand Island shall complete the construction of upgrades to Platte Generating Station that will result in either the elimination of pollutants in bottom ash transport water or elimination of discharge of bottom ash transport water to the settling pond and later discharge through Outfall 001. No later than December 31, 2023, either no more pollutants will be present in the station discharge of bottom ash transport water or the facility will not discharge bottom ash transport water to the settling pond or other impoundment.

At this time, any bottom ash transport water discharged prior to the date promulgated above to the settling pond will be classified as "legacy wastewater." Legacy wastewater will be subject to the limitations set forth for Outfall 001 in Table 6.

Part III. Other Requirements and Conditions

A. Polychlorinated Biphenyls (PCB)

There shall be no discharge of polychlorinated biphenyl compounds such as those commonly used for transformer fluid. At the discretion of the NDEQ, this requirement for no discharge of PCBs can be confirmed either by chemical analysis of the discharge effluent or by an engineering study which would demonstrate that PCBs are not present in the final discharge.

B. Narrative Limits

Discharges authorized under this permit;

1. Shall not be toxic to aquatic life in surface waters of the State outside the mixing zones allowed in NDEQ Title 117 - *Nebraska Surface Water Quality Standard*;
2. Shall not contain pollutants at concentrations or levels that produce objectionable films, colors, turbidity, deposits, or noxious odors in the receiving stream or waterway; and
3. Shall not contain pollutants at concentrations or levels that cause the occurrence of undesirable or nuisance aquatic life in the receiving stream.

C. Method Detection Limit Reporting Requirements

The minimum detection limit (MDL) is defined as the level at which the analytical system gives acceptable calibration points. If the analytical results are below the MDL then the reported value on the DMR shall be a numerical value less than the MDL (e.g. <0.005).

D. Notification of Chemical Addition

The NDEQ shall be notified if any changes in the chemical additives introduced into the cooling water system that are not chemically equivalent to existing additives. Notification shall include but is not limited to the submission to the NDEQ of MSDS sheets and product labels.

E. Response to Toxicity Noncompliance

If the whole effluent toxicity tests results exceed the toxicity limitations in this permit, this is a permit violation and the Department may require the permittee to initiate Toxicity Identification Evaluation/Toxicity Reduction Evaluation (TIE/TRE) studies. The permittee must initiate TIE/TRE studies according to the United States

Environmental Protection Agency *Methods for Aquatic Toxicity Evaluations and Generalized Methodology for Conducting Industrial Toxicity Reduction Evaluations (TRES)*.

F. Permit Attachments

The attachments to this permit may be modified without a formal modification of the permit.

G. Permit Modification and Reopening

The NDEQ reserves the right to make appropriate revisions to this permit in order to establish any appropriate effluent limitations, schedules of compliance, or other provisions which may be authorized under the Clean Water Act in order to bring all discharges into compliance with the Clean Water Act.

H. Electronic Submission of Discharge Monitoring Reports

The National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule requires electronic reporting of NPDES information rather than the currently required paper based reports from the permitted facilities. To comply with the federal rule, permittees will be required to submit DMRs electronically using the EPA NetDMR tool (Appendix A of 40 CFR part 127). Permittees may seek an electronic reporting waiver by submitting a letter to the department with a brief written statement regarding the basis for needing such a temporary waiver. The department will either approve or deny this electronic reporting waiver request. The duration of a temporary waiver may not exceed 5 years, which is the normal period for an NPDES permit term.

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Appendix A

Conditions Applicable to all NPDES Permits

The following conditions apply to all NPDES permits:

1. Information Available

All permit applications, fact sheets, permits, discharge data, monitoring reports, and any public comments concerning such shall be available to the public for inspection and copying, unless such information about methods or processes is entitled to protection as trade secrets of the owner or operator under Neb. Rev. Stat. §81-1527, (Reissue 1999) and NDEQ Title 115, Chapter 4.

2. Duty to Comply

- a. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Federal Clean Water Act and the Applicable State Statutes and Regulations and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.
- b. The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement.

3. Violations of this Permit

- a. Any person who violates this permit may be subject to penalties and sanctions as provided by the Clean Water Act.
- b. Any person who violates this permit may be subject to penalties and sanctions as provided by the Nebraska Environmental Protection Act.

4. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

5. Need to Halt or Reduce Activity not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

6. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

7. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes effective performance based on designed facility removals, effective management, adequate operator staffing and training, adequate process controls, adequate funding that reflects proper user fee schedules, adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary

facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of this permit.

8. Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

9. Property Rights

This permit does not convey any property rights of any sort, or any exclusive privilege.

10. Duty to Provide Information

The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

11. Inspection and Entry

The permittee shall allow the Director, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of credentials and other documents as may be required by law, to:

- a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
- b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
- c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
- d. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

12. Monitoring and Records

- a. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.
- b. Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR Part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.
- c. Records of monitoring information shall include:
 - i) The date(s), exact place, time and methods of sampling or measurements;
 - ii) The individual(s) who performed the sampling or measurements;
 - iii) The date(s) analyses were performed;
 - iv) The individual(s) who performed the analyses;
 - v) The analytical techniques or methods used; and

- vi) The results of such analyses.
- d. Monitoring must be conducted according to test procedures approved under NDEQ Title 119, Chapter 27 002 unless another method is required under 40 CFR Subchapters N – Effluent Guidelines and Standards Parts 425 to 471 or O – Sewer Sludge Parts 501 and 503.
- e. Falsifies, Tamper, or Knowingly Renders Inaccurate
 - i) On actions brought by EPA, the Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction: be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or both.
 - ii) On action brought by the State, The Nebraska Environmental Protection Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished pursuant to Neb. Stat. §81-1508.01.

13. Signatory requirements

- a. All applications, reports, or information submitted to the Director shall be signed and certified.
 - i) All permit applications shall be signed as follows:
 - (a) For a corporation
 - (i) By a responsible corporate officer: For the purpose of this section, a responsible corporate officer means:
 - (a) A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or
 - (b) The manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions which govern the operation of the regulated facility including having the explicit or implicit duty of making major capital investment recommendations, and initiating and directing other comprehensive measures to assure long term environmental compliance with environmental laws and regulations; the manager can ensure that the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.
 - (b) For a partnership or sole proprietorship
 - (i) By a general partner or the proprietor.
 - (c) For a municipality, State, Federal, or other public agency
 - (i) By either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a Federal agency includes:
 - (a) The chief executive officer of the agency, or
 - (b) A senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of EPA).
- b. Reports and Other Information
 - i) All reports required by permits, and other information requested by the Director shall be signed by a person described in this section [paragraphs] 3. a. i) (a),(b), or (c)], or by a duly authorized representative of that person. A person is a duly authorized representative only if:

- (a) The authorization is made in writing by a person described in paragraphs 13. a. i) (a),(b), or (c);
- (b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company, (a duly authorized representative may thus be either a named individual or any individual occupying a named position) and;
- (c) The written authorization is submitted to the Director.

c. Changes to Authorization

If an authorization of paragraphs 13. a. i) (a),(b), or (c) is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of this section must be submitted to the Director prior to or together with any reports, information, or applications to be signed by an authorized representative.

d. Certification

All applications, reports and information submitted as a requirement of this permit shall contain the following certification statement:

- i) I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

e. False Statement, Representation, or Certification

- i) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.
- ii) The Nebraska Environmental Protection Act provides criminal penalties and sanctions for false statement, representation, or certification in any application, label, manifest, record, report, plan, or other document required to be filed or maintained by the Environmental Protection Act, the Integrated Solid Waste Management Act, the Livestock Waste Management Act or the rules or regulations adopted and promulgated pursuant to such acts.

14. Reporting Requirements

a. Planned Changes

- i) The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:
 - (a) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in NDEQ Title 119, Chapter 4 and 8.
 - (b) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under NDEQ Title 119, Chapter 15.
 - (c) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions

that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan. The sludge program is not delegated to the State so notification to the EPA Regional Administrator in addition to the State is required.

b. Anticipated Noncompliance

The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

c. Transfers

This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under NDEQ Title 119, Chapter 24 in some cases, modification or revocation and reissuance is mandatory.

d. Monitoring Reports

- i) Monitoring results shall be reported at the intervals specified elsewhere in this permit.
- ii) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director.
- iii) Monitoring results shall be submitted on a quarterly basis using the reporting schedule set forth below, unless otherwise specified in this permit or by the Department.

Monitoring Quarters

January - March
April - June
July - September
October - December

DMR Reporting Deadlines

April 28
July 28
October 28
January 28

- iv) For reporting results of monitoring of sludge use or disposal practices
- v) Additional reports may be required by the EPA Regional Administrator.
- vi) If the permittee monitors any pollutant more frequently than required by the permit using test procedures approved in NDEQ Title 119, Chapter 27 002, or another method required for an industry-specific waste stream under 40 CFR Subchapters N – Effluent Guidelines and Standards Parts 425 to 471 and O – Sewer Sludge Parts 501 and 503, the results of such monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director or EPA Regional Administrator.
- vii) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

e. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

f. Twenty-four Hour Reporting

- i) The permittee shall report any noncompliance which may endanger human health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

- ii) The following shall be included as information which must be reported within 24 hours under this paragraph.
 - (a) Any unanticipated bypass which exceeds any effluent limitation in this permit.
 - (b) Any upset which exceeds any effluent limitation in this permit.
 - (c) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours.
- g. The Director may waive the written report on a case-by-case basis for reports under section 14. f. ii) (a), (b) and (c) if the oral report has been received within 24 hours.
- h. Other noncompliance

The permittee shall report all instances of noncompliance not reported under paragraphs d., e., and f. of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph f. of this section.
- i. Other information

Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.
- j. Noncompliance Report Forms
 - i) Noncompliance Report Forms are available from the Department and shall be submitted with or as the written noncompliance report.
 - ii) The submittal of a written noncompliance report does not relieve the permittee of any liability from enforcement proceedings that may result from the violation of permit or regulatory requirements.

15. Bypass

- a. Definitions
 - i) Bypass means the intentional diversion of waste streams from any portion of a treatment facility.
 - ii) Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
- b. Bypass Not Exceeding Limitations

The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 15.c. and d. of this section.
- c. Notice
 - i) Anticipated Bypass

If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.
 - ii) Unanticipated Bypass

The permittee shall submit notice of an unanticipated bypass as required in paragraph 14.f. of this section (24-hour notice).
- d. Prohibition of Bypass

Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

- i) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
 - ii) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
 - iii) The permittee submitted notices as required under paragraph 15.c. of this section.
- c. The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph 15.d.

16. Upset

a. Definition

Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

b. Effect of an Upset

An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph 16.c. of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions Necessary for a Demonstration of Upset.

A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

- i) An upset occurred and that the permittee can identify the cause(s) of the upset;
- ii) The permitted facility was at the time being properly operated;
- iii) The permittee submitted notice of the upset as required in paragraph 14.f. ii) (a), of this section (24-hour notice).
- iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

d. Burden of Proof

In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

17. Other Rules and Regulations Liability

The issuance of this permit in no way relieves the obligation of the permittee to comply with other rules and regulations of the Department.

18. Severability

If any provision of this permit is held invalid, the remainder of this permit shall not be affected.

19. Other Conditions that Apply to NPDES and NPP Permits

a. Land Application of Wastewater Effluent

The permittee shall be permitted to discharge treated domestic wastewater effluent by means of land application in accordance with the regulations and standards set forth in NDEQ Title 119, Chapter 12 002.

The Wastewater Section of the Department must be notified in writing if the permittee chooses to land apply effluent.

b. Toxic Pollutants

The permittee shall not discharge pollutants to waters of the state that cause a violation of the standards established in NDEQ Titles 117, 118 or 119. All discharges to surface waters of the state shall be free of toxic (acute or chronic) substances which alone or in combination with other substances, create conditions unsuitable for aquatic life outside the appropriate mixing zone.

c. Oil and Hazardous Substances/Spill Notification

Nothing in this permit shall preclude the initiation of any legal action or relieve the permittee from any responsibilities, liabilities or penalties under section 311 of the Clean Water Act. The permittee shall conform to the provisions set forth in NDEQ Title 126, Rules and Regulations Pertaining to the Management of Wastes. If the permittee knows, or has reason to believe, that oil or hazardous substances were released at the facility and could enter waters of the state or any of the outfall discharges authorized in this permit, the permittee shall immediately notify the Department of a release of oil or hazardous substances. During Department office hours (i.e., 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays), notification shall be made to the Nebraska Department of Environmental Quality at telephone numbers (402) 471-2186 or (877) 253-2603 (toll free). When NDEQ cannot be contacted, the permittee shall report to the Nebraska State Patrol for referral to the NDEQ Immediate Response Team at telephone number (402) 471-4545. It shall be the permittee's responsibility to maintain current telephone numbers necessary to carry out the notification requirements set forth in this paragraph.

d. Removed Substances

- i) Solids, sludge, filter backwash or other pollutants removed in the course of treatment or control of wastewater shall be disposed of at a site and in a manner approved by the Nebraska Department of Environmental Quality.
 - (a) The disposal of nonhazardous industrial sludges shall conform to the standards established in or to the regulations established pursuant to 40 CFR Part 257.
 - (b) The disposal of sludge shall conform to the standards established in or to the regulations established pursuant to 40 CFR Part 503.
 - (c) If solids are disposed of in a licensed sanitary landfill, the disposal of solids shall conform to the standards established in NDEQ Title 132.
- ii) Publicly owned treatment works shall dispose of sewage sludge in a manner that protects public health and the environment from any adverse effects which may occur from toxic pollutants as defined in Section 307 of the Clean Water Act.
- iii) This permit may be modified or revoked and reissued to incorporate regulatory limitations established pursuant to 40 CFR Part 503.

e. Representative Sampling

- i) Samples and measurements taken as required within this permit shall be representative of the discharge. All samples shall be taken at the monitoring points specified in this permit and, unless otherwise specified, before the effluent joins or is diluted by any other waste stream, body of water, or substance. Monitoring points shall not be changed without notification to the Department and with the written approval of the Director.
- ii) Composite sampling shall be conducted in one of the following manners;
 - (a) Continuous discharge - a minimum of one discrete aliquot collected every three hours,
 - (b) Less than 24 hours - a minimum of hourly discrete aliquots or a continuously drawn sample shall be collected during the discharge, or

- (c) Batch discharge - a minimum of three discrete aliquots shall be collected during each discharge.
 - (d) Composite samples shall be collected in one of the following manners:
 - (i) The volume of each aliquot must be proportional to either the waste stream flow at the time of sampling or the total waste stream flow since collection of the previous aliquot,
 - (ii) A number of equal volume aliquots taken at varying time intervals in proportion to flow,
 - (iii) A sample continuously collected in proportion to flow, and
 - (e) Where flow proportional sampling is infeasible or non-representative of the pollutant loadings, the Department may approve the use of time composite samples.
 - (f) Grab samples shall consist of a single aliquot collected over a time period not exceeding 15 minutes.
- iii) All sample preservation techniques shall conform to the methods adopted in NDEQ Title 119, Chapter 21 006 unless:
 - (a) In the case of sludge samples, alternative techniques are specified in 40 CFR Part 503, or
 - (b) Other procedures are specified in this permit.
 - iv) Flow Measurements

Appropriate flow measurement devices and methods consistent with accepted scientific practices shall be used to insure the accuracy and reliability of measurements. The devices shall be installed, calibrated and maintained to insure the accuracy of the measurements. The accepted capability shall be consistent with that type of device. Devices selected shall be capable of measuring flows with a maximum deviation of +/- 10%. The amount of deviation shall be from the true discharge rates throughout the range of expected discharge volumes. Guidance can be obtained from the following references for the selection, installation, calibration and operation of acceptable flow measurement devices:

 - (a) "Water Measurement Manual," U.S. Department of the Interior, Bureau of Reclamation, Third Edition, Revised Reprint, 2001.
(Available online at <http://www.usbr.gov/tsc/techreferences/mands/wmm/index.htm>)
 - (b) "NPDES Compliance Flow Measurement Manual," U.S. Environmental Protection Agency, Office of Water Enforcement, Publication MCD-77, September 1981, 147 pp.
(Available online at <http://www.epa.gov/nscep>, and enter 'NPDES Compliance Flow Measurement Manual, Publication MCD-77' in the search box)
- f. Changes of Loadings to Publicly Owned Treatment Works (POTWs)

All POTWs must provide adequate notice to the Director of the following:

 - i) Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to NDEQ Title 119, Chapter 26, if it were directly discharging those pollutants;
 - ii) Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.
 - iii) For purposes of this paragraph, adequate notice shall include information on the quality and quantity of effluent introduced into the POTW, and any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

20. Definitions

Administrator: The Administrator of the USEPA.

Aliquot: An individual sample having a minimum volume of 100 milliliters that is collected either manually or in an automatic sampling device.

Annually: Once every calendar year.

Authorized Representative: Individual or position designated the authorization to submit reports, notifications, or other information requested by the Director on behalf of the Owner under the circumstances that the authorization is made in writing by the Owner, the authorization specifies the individual or position who is duly authorized, and the authorization is submitted to the Director.

Bimonthly: Once every other month.

Biosolids: Sewage sludge that is used or disposed through land application, surface disposal, incineration, or disposal in a municipal solid waste landfill.

Biweekly: Once every other week.

Bypass: The intentional diversion of wastes from any portion of a treatment facility.

Certifying Official: See Section 13, Standard Conditions above.

Daily Average: An effluent limitation that cannot be exceeded and is calculated by averaging the monitoring results for any given pollutant parameter obtained during a 24-hour day.

Department: Nebraska Department of Environmental Quality.

Director: The Director of the Nebraska Department of Environmental Quality.

Industrial Discharge: Wastewater that originates from an industrial process and / or is noncontact cooling water and / or is boiler blowdown.

Industrial User: A source of indirect discharge (a pretreatment facility).

Monthly Average: An effluent limitation that cannot be exceeded. It is calculated by averaging any given pollutant parameter monitoring results obtained during a calendar month.

Operator: A person (often the general contractor) designated by the owner who has day to day operational control and/or the ability to modify project plans and specifications related to the facility.

Owner: A person or party possessing the title of the land on which the activities will occur; or if the activity is for a lease holder, the party or individual identified as the lease holder; or the contracting government agency responsible for the activity.

Outfall: A discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, or container from which pollutants are or may be discharged into Waters of the State.

Passive Discharge: A discharge from a POTW that occurs in the absence of an affirmative action and is not authorized by the NPDES permit (e.g. discharges due to a leaking valve, discharges from an overflow structure) and / or is a discharge from an overflow structure not designed as part of the POTW (e.g. discharges resulting from lagoon berm / dike breaches).

Publicly Owned Treatment Works (POTW): A treatment works as defined by Section 212 of the Clean Water Act (Public Law 100-4) which is owned by the state or municipality, excluding any sewers or other conveyances not leading to a facility providing treatment.

Semiannually: Twice every year.

Significant Industrial User (SIU): All industrial users subject to Categorical Pretreatment Standards or any industrial user that, unless exempted under Chapter 1, Section 105 of NDEQ Title 119, discharges an average of 25,000 gallons per day or more of process water; or contributes a process waste stream which makes up 5 percent or more of the average dry weather hydraulic or organic capacity of the POTW; or is designated as such by the Director on the basis that the industrial user has a reasonable potential for adversely affecting the POTW's operation or for violating any National Pretreatment Standard or requirement.

Sludge: Any solid, semisolid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effect.

30-Day Average: An effluent limitation that cannot be exceeded. It is calculated by averaging any given pollutant parameter monitoring results obtained during a calendar month.

Total Toxic Organics (TTO): The summation of all quantifiable values greater than 0.01 milligrams per liter (mg/l) for toxic organic compounds that may be identified elsewhere in this permit. (If this term has application in this permit, the list of toxic organic compounds will be identified, typically in the Limitations and Monitoring Section(s) and/or in an additional Appendix to this permit.)

Toxic Pollutant: Those pollutants or combination of pollutants, including disease causing agents, after discharge and upon exposure, ingestion, inhalation or assimilation into an organism, either directly from the environment or indirectly by ingestion through food chains will, on the basis of information available to the administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunction (including malfunctions in reproduction), or physical deformations in such organisms or their offspring.

Upset: An exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee, excluding such factors as operational error, improperly designed or inadequate treatment facilities, or improper operation and maintenance or lack thereof.

Volatile Organic Compounds (VOC): The summation of all quantifiable values greater than 0.01 milligrams per liter (mg/l) for volatile, toxic organic compounds that may be identified elsewhere in this permit. (See the definition for Total Toxic Organics above. In many instances, VOCs are defined as the volatile fraction of the TTO parameter. If the term VOC has application in this permit, the list of toxic organic compounds will be identified, typically in the Limitations and Monitoring Section(s) and/or in an additional Appendix to this permit.)

Waters of the State: All waters within the jurisdiction of this state including all streams, lakes, ponds, impounding reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state.

Weekly Average: An effluent limitation that cannot be exceeded. It is calculated by averaging any given pollutant parameter monitoring results obtained during a fixed calendar week. The permittee may start their week on any weekday but the weekday must remain fixed. The Department approval is required for any change of the starting day.

"X" Day Average: An effluent limitation defined as the maximum allowable "X" day average of consecutive monitoring results during any monitoring period where "X" is a number in the range of one to seven days.

21. Abbreviations

CFR: Code of Federal Regulations

kg/Day: Kilograms per Day

MGD: Million Gallons per Day

mg/L: Milligrams per Liter

NOI: Notice of Intent

NDEQ: Nebraska Department of Environmental Quality

NDEQ Title 115: Rules of Practice and Procedure

NDEQ Title 117: Nebraska Surface Water Quality Standards

NDEQ Title 118: Ground Water Quality Standards and Use Classification

NDEQ Title 119: Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System

NDEQ Title 126: Rules and Regulations Pertaining to the Management of Wastes

NDEQ Title 132: Integrated Solid Waste Management Regulations

NPDES: National Pollutant Discharge Elimination System

NPP: Nebraska Pretreatment Program

POTW: Publicly Owned Treatment Works

µg/L: Micrograms per Liter

WWTF: Wastewater Treatment Facility

Guidance for Conducting Toxicity Testing and TIE/TRE Studies

(January 2001)

1. Test Procedures

Acute and chronic toxicity is a measure of the toxic effect that a waste water effluent may have on living organisms (i.e., *Pimephales promelas* and *Ceriodaphnia* species). Acute and chronic toxicity analyses are conducted using the EPA approved Whole Effluent Toxicity (WET) test methods set forth in 40 CFR, Part 136 (July 1996 edition). These test methods establish standardized conditions and require that certain chemical and physical analyses be conducted in conjunction with the toxicity analysis.

2. Results Reporting

Test results are reported in terms of toxic units. Acute toxic units are abbreviated TU_a, and are the inverse of the LC₅₀ (i.e., the concentration of effluent that is lethal to 50% of the organisms) expressed as a decimal fraction. Chronic toxic units are abbreviated TU_c, and are the inverse of the NOEC (i.e., the highest concentration of effluent at which there is no observed effect on the organisms) with respect to growth or reproductive inhibition) expressed as a decimal fraction. The tables below provide examples of the LC₅₀ and NOEC conversions to toxic units.

LC ₅₀	Decimal Fraction	TU _a	NOEC	Decimal Fraction	TU _c
0.1 %	0.001	1000	0.1 %	0.001	1000
1%	0.01	100	1%	0.01	100
10%	0.1	10	10%	0.1	10
25%	0.25	4	25%	0.25	4
50%	0.5	2	50%	0.5	2
100%	1	1	100%	1	1

3. Initial Response to Non-Compliance

If the permit limits for toxicity are exceeded, the permittee typically needs to perform the following actions.

- a. Submit a written non-compliance report (NCR) within 5 days. In the NCR, identify any suspect sources of the toxicity and describe any measures being taken to reduce toxicity.
- b. Conduct a follow-up toxicity testing with both organisms within four (4) weeks.

4. Return to Compliance

If the follow-up test results are in compliance with the limits in the permit, the permittee typically needs to perform the following actions.

- a. Within 30 days submit the results of the follow-up test in a written report to the NDEQ. The written report should discuss the effect of the measures taken to reduce toxicity. The report should also provide the NDEQ with a recommendation relative to their success and, if ongoing, the need to continue implementing these measures.
- b. Testing can generally be resumed on the routine schedule established in the permit, unless the NDEQ specifies otherwise. The NDEQ can require additional follow-up testing on a case-by-case basis (e.g., if there was no apparent reason why toxicity decreased). Any measures taken to reduce toxicity will generally need to be continued as Best Management Practices, unless the NDEQ provides a written approval for their discontinuance.

5. Actions to Address Continued Non-Compliance

If the follow-up toxicity test results are not in compliance with the permit limits, the permittee typically needs to perform Toxicity Identification Evaluations (TIE) and Toxicity Reduction Evaluations (TRE) as specified below. The permittee is responsible for maintaining compliance with the toxicity limits in this permit. The undertaking of the TIE/TRE process does not constitute compliance unless or until compliance with the permit limits is achieved. See explanatory note below concerning Departmental actions to address non-compliance.

- a. Development and implementation of a Toxicity Identification Evaluation (TIE) needs to begin immediately. A summary plan for the initiation of the TIE should be submitted to the NDEQ within 30 days of when the follow-up of non-compliant result is received. A meeting with the NDEQ to discuss TIE/TRE alternatives within this period is encouraged.
- b. A complete TIE/TRE schedule should be submitted to the NDEQ within 90 days. The NDEQ will seek clarification on at least some aspects of the schedule, and may request some modification.
- c. The TIE and TRE processes should continue concurrently; i.e., as the TIE process identifies toxicity sources, reasonable measures to reduce the toxicity from these sources should be taken. The TIE/TRE schedule may need to be revised in response to ongoing TIE/TRE activities.
- d. Sometimes it is possible to forego or discontinue the TIE process, and proceed directly with the TRE process. However, before abandoning the TIE process, it is important that:
 - i. the source of the toxicity be known; and
 - ii. NDEQ concurs with this approach.

Note: On-going non-compliance with a toxicity limit will typically be addressed in one of two ways depending on whether agreement can be achieved between the NDEQ and permittee on the TIE/TRE schedule and procedures. If agreement can be achieved, the NDEQ and the permittee may wish to enter into a Consent Order. If agreement cannot be achieved, the NDEQ may proceed unilaterally via administrative and/or enforcement actions. In most instances, it is advantageous for all parties if a mutually agreed to TIE/TRE process can be implemented. For that reason, early meetings and discussions with the Department are encouraged.

Attachment 2 – Sampling and Analysis Requirements for Process Wastewater Discharges for the NPDES Permit Renewal Application

Except for stormwater discharges, all manufacturing, commercial, mining and silvicultural dischargers applying for NPDES permits which discharge process wastewater shall provide the information in Section A through D to the Department once per permit term.

A. General Required Sampling and Analysis

Every applicant must report quantitative data for every outfall directly discharging process wastewater for the following pollutants:

- Biochemical Oxygen Demand (BOD₅)
- Chemical Oxygen Demand
- Total Organic Carbon
- Total Suspended Solids
- Ammonia (as N)
- Temperature (both winter and summer)
- pH

The Director may waive the reporting requirements for individual point sources or for a particular industry category for one or more of the pollutants listed in Section A if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

B. Industry Specific Sampling and Analysis

Each applicant with processes in one or more primary industry category (see Section C) contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater:

1. The organic toxic pollutants in the fractions designated in Table I for the applicant's industrial category or categories unless the applicant qualifies as a small business under paragraph (g)(8) of 40 CFR 122.21. Table II lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromatography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes (see Part D).
2. The pollutants listed in Table III (the toxic metals, cyanide, and total phenols).
3. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table IV (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.
4. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in table II or table III (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under paragraph (g)(7)(v) of 40 CFR 122.21 are discharged from each outfall. For every pollutant expected to be discharged in concentrations of 10 ppb or greater the applicant must report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4, 6 dinitrophenol, where any of these four pollutants are expected to be discharged in concentrations of 100 ppb or greater the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than 10 ppb, or in the case of acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4, 6 dinitrophenol, in concentrations less than 100 ppb, the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under paragraph (g)(8) of 40 CFR 122.21 is not required to analyze for pollutants listed in table II (the organic toxic pollutants).
5. Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in table V (certain hazardous substances and asbestos) are discharged from each outfall. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

6. Each applicant must report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:
 - a. Uses or manufactures 2,4,5-trichlorophenoxy acetic acid (2,4,5,-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5,-TP); 2-(2,4,5-trichlorophenoxy) ethyl, 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnell); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or
 - b. Knows or has reason to believe that TCDD is or may be present in an effluent.

C. Applicable Primary Industry Categories

Adhesives and sealants	Ore mining
Aluminum forming	Organic chemicals manufacturing
Aluminum forming	Paint and ink formulation
Auto and other laundries	Pesticides
Battery manufacturing	Petroleum refining
Coal mining	Pharmaceutical preparations
Coil coating	Photographic equipment and supplies
Copper forming	Plastics processing
Electrical and electronic components	Plastic and synthetic materials manufacturing
Electroplating	Porcelain enameling
Explosives manufacturing	Printing and publishing
Foundries	Pulp and paper mills
Gum and wood chemicals	Rubber processing
Inorganic chemicals manufacturing	Soap and detergent manufacturing
Iron and steel manufacturing	Steam electric power plants
Leather tanning and finishing	Textile mills
Mechanical products manufacturing	Timber products processing
Nonferrous metals manufacturing	

Table I—Testing Requirements for Organic Toxic Pollutants by Industrial Category for Existing Dischargers

Industrial category	GC/MS Fraction ¹			
	Volatile	Acid	Base/neutral	Pesticide
Adhesives and Sealants	2	2	2	
Aluminum Forming	2	2	2	
Auto and Other Laundries	2	2	2	2
Battery Manufacturing	2		2	
Coal Mining	2	2	2	2
Coil Coating	2	2	2	
Copper Forming	2	2	2	
Electric and Electronic Components	2	2	2	2
Electroplating	2	2	2	
Explosives Manufacturing		2	2	
Foundries	2	2	2	
Gum and Wood Chemicals	2	2	2	2
Inorganic Chemicals Manufacturing	2	2	2	
Iron and Steel Manufacturing	2	2	2	
Leather Tanning and Finishing	2	2	2	2
Mechanical Products Manufacturing	2	2	2	
Nonferrous Metals Manufacturing	2	2	2	2
Ore Mining	2	2	2	2
Organic Chemicals Manufacturing	2	2	2	2
Paint and Ink Formulation	2	2	2	2
Pesticides	2	2	2	2
Petroleum Refining	2	2	2	2
Pharmaceutical Preparations	2	2	2	
Photographic Equipment and Supplies	2	2	2	2
Plastic and Synthetic Materials Manufacturing	2	2	2	2
Plastic Processing	2			
Porcelain Enameling	2		2	2
Printing and Publishing	2	2	2	2
Pulp and Paper Mills	2	2	2	
Rubber Processing	2	2	2	
Soap and Detergent Manufacturing	2	2	2	
Steam Electric Power Plants	2	2	2	
Textile Mills	2	2	2	2
Timber Products Processing	2	2	2	2

¹The toxic pollutants in each fraction are listed in Table II.²Testing required.

Table II—Organic Toxic Pollutants in Each of Four Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GS/MS)

Volatiles		
1V acrolein	11V chloroform	22V methylene chloride
2V acrylonitrile	12V dichlorobromomethane	23V 1,1,2,2-tetrachloroethane
3V benzene	14V 1,1-dichloroethane	24V tetrachloroethylene
5V bromoform	15V 1,2-dichloroethane	25V toluene
6V carbon tetrachloride	16V 1,1-dichloroethylene	26V 1,2-trans-dichloroethylene
6V carbon tetrachloride	17V 1,2-dichloropropane	27V 1,1,1-trichloroethane
7V chlorobenzene	18V 1,3-dichloropropylene	28V 1,1,2-trichloroethane
8V chlorodibromomethane	19V ethylbenzene	29V trichloroethylene
9V chloroethane	20V methyl bromide	31V vinyl chloride
10V 2-chloroethylvinyl ether	21V methyl chloride	
Acid Compounds		
1A 2-chlorophenol	5A 2,4-dinitrophenol	9A pentachlorophenol
2A 2,4-dichlorophenol	6A 2-nitrophenol	10A phenol
3A 2,4-dimethylphenol	7A 4-nitrophenol	11A 2,4,6-trichlorophenol
4A 4,6-dinitro-o-cresol	8A p-chloro-m-cresol	
Base/Neutral		
1B acenaphthene	17B 4-chlorophenyl phenyl ether	32B fluorene
2B acenaphthylene	18B chrysene	33B hexachlorobenzene
3B anthracene	19B dibenzo(a,h)anthracene	34B hexachlorobutadiene
4B benzidine	20B 1,2-dichlorobenzene	35B hexachlorocyclopentadiene
5B benzo(a)anthracene	21B 1,3-dichlorobenzene	36B hexachloroethane
6B benzo(a)pyrene	22B 1,4-dichlorobenzene	37B indeno(1,2,3-cd)pyrene
7B 3,4-benzofluoranthene	23B 3,3'-dichlorobenzidine	38B isophorone
8B benzo(ghi)perylene	24B diethyl phthalate	39B naphthalene
9B benzo(k)fluoranthene	25B dimethyl phthalate	40B nitrobenzene
10B bis(2-chloroethoxy)methane	26B di-n-butyl phthalate	41B N-nitrosodimethylamine
11B bis(2-chloroethyl)ether	27B 2,4-dinitrotoluene	42B N-nitrosodi-n-propylamine
12B bis(2-chloroisopropyl)ether	28B 2,6-dinitrotoluene	43B N-nitrosodiphenylamine
13B bis(2-ethylhexyl)phthalate	29B di-n-octyl phthalate	44B phenanthrene
14B 4-bromophenyl phenyl ether	30B 1,2-diphenylhydrazine (as azobenzene)	45B pyrene
15B butylbenzyl phthalate		46B 1,2,4-trichlorobenzene
16B 2-chloronaphthalene	31B fluoranthene	
Pesticides		
1P aldrin	10P dieldrin	19P PCB-1254
2P alpha-BHC	11P alpha-endosulfan	20P PCB-1221
3P beta-BHC	12P beta-endosulfan	21P PCB-1232
4P gamma-BHC	13P endosulfan sulfate	22P PCB-1248
5P delta-BHC	14P endrin	23P PCB-1260
6P chlordane	15P endrin aldehyde	24P PCB-1016
7P 4,4'-DDT	16P heptachlor	25P toxaphene
8P 4,4'-DDE	17P heptachlor epoxide	
9P 4,4'-DDD	18P PCB-1242	

Table III—Conventional and Nonconventional Pollutants Required to Be Tested by Existing Dischargers if Expected to be Present

Bromide	Phosphorus, Total	Boron, Total
Chlorine, Total Residual	Radioactivity	Cobalt, Total
Color	Sulfate	Iron, Total
Fecal Coliform	Sulfide	Magnesium, Total
Fluoride	Sulfite	Molybdenum, Total
Nitrate-Nitrite	Surfactants	Manganese, Total
Nitrogen, Total Organic	Aluminum, Total	Tin, Total
Oil and Grease	Barium, Total	Titanium, Total

Table IV—Toxic Pollutants and Hazardous Substances Required To Be Identified by Existing Dischargers if Expected To Be Present

Toxic Pollutants		
Asbestos		
Hazardous Substances		
Acetaldehyde	Dinitrobenzene	Nitrotoluene
Allyl alcohol	Diquat	Parathion
Allyl chloride	Disulfoton	Phenolsulfanate
Amyl acetate	Diuron	Phosgene
Aniline	Epichlorohydrin	Propargite
Benzonitrile	Ethion	Propylene oxide
Benzyl chloride	Ethylene diamine	Pyrethrins
Butyl acetate	Ethylene dibromide	Quinoline
Butylamine	Formaldehyde	Resorcinol
Captan	Furfural	Strontium
Carbaryl	Guthion	Strychnine
Carbofuran	Isoprene	Styrene
Carbon disulfide	Isopropanolamine	2,4,5-T (2,4,5-Trichlorophenoxy acetic acid)
Chlorpyrifos	Dodecylbenzenesulfonate	TDE (Tetrachlorodiphenylethane)
Coumaphos	Kelthane	2,4,5-TP [2-(2,4,5-Trichlorophenoxy) propanoic acid]
Cresol	Kepone	Trichlorofan
Crotonaldehyde	Malathion	Triethanolamine
Cyclohexane	Mercaptodimethur	dodecylbenzenesulfonate
2,4-D (2,4-Dichlorophenoxy acetic acid)	Methoxychlor	Triethylamine
Diazinon	Methyl mercaptan	Trimethylamine
Dicamba	Methyl methacrylate	Uranium
Dichlobenil	Methyl parathion	Vanadium
Dichlone	Mevinphos	Vinyl acetate
2,2-Dichloropropionic acid	Mexacarbate	Xylene
Dichlorvos	Monoethyl amine	Xylenol
Diethyl amine	Monomethyl amine	Zircon
Dimethyl amine	Naled	
	Napthenic acid	

D. Suspensions

The Environmental Protection Agency has suspended the requirements of 40 CFR 122.21(g)(7)(ii)(A) and Table I as they apply to certain industrial categories. The suspensions are as follows:

1. At 46 FR 2046, Jan. 8, 1981, the Environmental Protection Agency suspended until further notice §122.21(g)(7)(ii)(A) as it applies to coal mines.
2. At 46 FR 22585, Apr. 20, 1981, the Environmental Protection Agency suspended until further notice §122.21(g)(7)(ii)(A) and the corresponding portions of Item V-C of the NPDES application Form 2c as they apply to:
 - a. Testing and reporting for all four organic fractions in the Greige Mills Subcategory of the Textile Mills industry (Subpart C—Low water use processing of 40 CFR part 410), and testing and reporting for the pesticide fraction in all other subcategories of this industrial category.
 - b. Testing and reporting for the volatile, base/neutral and pesticide fractions in the Base and Precious Metals Subcategory of the Ore Mining and Dressing industry (subpart B of 40 CFR part 440), and testing and reporting for all four fractions in all other subcategories of this industrial category.
 - c. Testing and reporting for all four GC/MS fractions in the Porcelain Enameling industry.
3. At 46 FR 35090, July 1, 1981, the Environmental Protection Agency suspended until further notice §122.21(g)(7)(ii)(A) and the corresponding portions of Item V-C of the NPDES application Form 2c as they apply to:
 - a. Testing and reporting for the pesticide fraction in the Tall Oil Rosin Subcategory (subpart D) and Rosin-Based Derivatives Subcategory (subpart F) of the Gum and Wood Chemicals industry (40 CFR part 454), and testing and reporting for the pesticide and base/neutral fractions in all other subcategories of this industrial category.
 - b. Testing and reporting for the pesticide fraction in the Leather Tanning and Finishing, Paint and Ink Formulation, and Photographic Supplies industrial categories.
 - c. Testing and reporting for the acid, base/neutral and pesticide fractions in the Petroleum Refining industrial category.
 - d. Testing and reporting for the pesticide fraction in the Papergrade Sulfite subcategories (subparts J and U) of the Pulp and Paper industry (40 CFR part 430); testing and reporting for the base/neutral and pesticide fractions in the following subcategories: Deink (subpart Q), Dissolving Kraft (subpart F), and Paperboard from Waste Paper (subpart E); testing and reporting for the volatile, base/neutral and pesticide fractions in the following subcategories: BCT Bleached Kraft (subpart H), Semi-Chemical (subparts B and C), and Nonintegrated-Fine Papers (subpart R); and testing and reporting for the acid, base/neutral, and pesticide fractions in the following subcategories: Fine Bleached Kraft (subpart I), Dissolving Sulfite Pulp (subpart K), Groundwood-Fine Papers (subpart O), Market Bleached Kraft (subpart G), Tissue from Wastepaper (subpart T), and Nonintegrated-Tissue Papers (subpart S).
 - e. Testing and reporting for the base/neutral fraction in the Once-Through Cooling Water, Fly Ash and Bottom Ash Transport Water process wastestreams of the Steam Electric Power Plant industrial category.

4. For the duration of the suspensions, therefore, Table I effectively reads:

Table I—Testing Requirements for Organic Toxic Pollutants by Industry Category

Industry category	GC/MS fraction ²			
	Volatile	Acid	Neutral	Pesticide
Adhesives and sealants	1	1	1	
Aluminum forming	1	1	1	
Auto and other laundries	1	1	1	1
Battery manufacturing	1		1	
Coal mining				
Coil coating	1	1	1	
Copper forming	1	1	1	
Electric and electronic compounds	1	1	1	1
Electroplating	1	1	1	
Explosives manufacturing		1	1	
Foundries	1	1	1	
Gum and wood (all subparts except D and F)	1	1		
Subpart D—tall oil rosin	1	1	1	
Subpart F—rosin-based derivatives	1	1	1	
Inorganic chemicals manufacturing	1	1	1	
Iron and steel manufacturing	1	1	1	
Leather tanning and finishing	1	1	1	
Mechanical products manufacturing	1	1	1	
Nonferrous metals manufacturing	1	1	1	1
Ore mining (applies to the base and precious metals/Subpart B)		1		
Organic chemicals manufacturing	1	1	1	1
Paint and ink formulation	1	1	1	
Pesticides	1	1	1	1
Petroleum refining	1			
Pharmaceutical preparations	1	1	1	
Photographic equipment and supplies	1	1	1	
Plastic and synthetic materials manufacturing	1	1	1	1
Plastic processing	1			
Porcelain enameling				
Printing and publishing	1	1	1	1
Pulp and paperboard mills—see Page C8				
Rubber processing	1	1	1	
Soap and detergent manufacturing	1	1	1	
Steam electric power plants	1	1		
Textile mills (Subpart C—Greige Mills are exempt from this table)	1	1	1	
Timber products processing	1	1	1	1

¹Testing required.²The pollutants in each fraction are listed in Table II.

Pulp and Paperboard Mills:

Subpart ³	VOA	Acid	GS/MS fractions	
			Base/neutral	Pesticides
A	2	1	2	1
B	2	1	2	2
C	2	1	2	2
D	2	1	2	2
E	1	1	2	1
F	1	1	2	2
G	1	1	2	2
H	1	1	2	2
I	1	1	2	2
J	1	1	1	2
K	1	1	2	2
L	1	1	2	2
M	1	1	2	2
N	1	1	2	2
O	1	1	2	2
P	1	1	2	2
Q	1	1	2	1
R	2	1	2	2
S	1	1	2	1
T	1	1	2	1
U	1	1	1	2

¹Must test.²Do not test unless "reason to believe" it is discharged.³Subparts are defined in 40 CFR Part 430.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CLEAN WATER ACTION, *et al.*,

Petitioners,

v.

E. SCOTT PRUITT, Administrator,
U.S. Environmental Protection Agency
and U.S. ENVIRONMENTAL
PROTECTION AGENCY

Respondents.

Case No. 17-1193

EXHIBIT 3

**Verified Settlement Testimony of Kelly R.
Carmichael**

USCA11 Case #17-1193

Document #1720468

Filed: 03/02/2018 Page 2 of 17

June 22, 2017

Petitioner's Exhibit No. 2-S**Cause No. 44872**

INDIANA UTILITY

Northern Indiana Public Service Company**Page 1**

REGULATORY COMMISSION

VERIFIED SETTLEMENT TESTIMONY OF KELLY R. CARMICHAEL

1 **Q1. Please state your name, business address, and title.**

2 A1. My name is Kelly R. Carmichael. My business address is 801 E. 86th
3 Avenue, Merrillville, Indiana 46410. I am currently the Vice President,
4 Environmental for NiSource Corporate Services Company.

5 **Q2. Are you the same Kelly R. Carmichael who prefiled direct testimony in**
6 **this Cause?**

7 A2. Yes.

8 **Q3. What is the purpose of your settlement testimony in this proceeding?**

9 A3. The purpose of my settlement testimony is to support the Stipulation and
10 Settlement Agreement entered into as of the 9th day of June, 2017, by and
11 between NIPSCO, Citizens Action Coalition of Indiana, Inc. ("CAC"), the
12 Indiana Office of Utility Consumer Counselor ("OUCC"), and NIPSCO
13 Industrial Group (the "Settling Parties") filed in this Cause on June 9, 2017
14 (the "Settlement"). Specifically, I outline recent changes to the Effluent
15 Limitation Guidelines rule that became effective on January 4, 2016 (the

1 "ELG Rule") and the Coal Combustion Residuals rule that became effective
2 October 19, 2015 (the "CCR Rule,") as well as how the component projects
3 making up the Environmental Compliance Project addressed under the
4 Settlement will allow NIPSCO to achieve compliance with the CCR Rule.

5 **Changes to the ELG Rule**

6 **Q4. Have there been any changes that impact implementation of the ELG**
7 **Rule since the filing of NIPSCO's initial testimony?**

8 A4. Yes. On April 25, 2017, the EPA published notice of an administrative stay
9 for ELG deadlines in the Federal Register. The EPA stayed the compliance
10 deadlines for the Best Available Technology ("BAT") limitations and
11 pretreatment standards for fly ash transport water, bottom ash transport
12 water, flue gas desulfurization ("FGD") wastewater, flue gas mercury
13 control wastewater, and gasification wastewater. During the time the
14 deadlines are stayed, the EPA will review and reconsider the ELG Rule.
15 Additionally, the Fifth Circuit Court of Appeals granted EPA's motion to
16 hold litigation related to the ELG Rule in abeyance for one hundred and
17 twenty (120) days, until August 12, 2017. Because the April 25 action
18 postponed the compliance dates pending judicial review, the EPA decided

1 to take further action in the event that the litigation related to the ELG Rule
2 ends. Accordingly, on June 6, 2017, the EPA also published notice of a
3 proposed rulemaking to postpone the compliance dates until EPA
4 completes reconsideration of the ELG Rule.

5 **Q5. Will the EPA's administrative stay and reconsideration of portions of the**
6 **ELG Rule change NIPSCO's proposed Environmental Compliance**
7 **Project?**

8 A5. No. In its June 6, 2017 proposed rulemaking the EPA identified five (5)
9 wastewater streams with limitations that may be reconsidered. NIPSCO
10 already complies with, or does not generate, three (3) of the wastewater
11 streams. The bottom ash transport water is addressed by the
12 Environmental Compliance Project, while the FGD wastewater will be
13 specifically addressed at a later time as part of NIPSCO's compliance with
14 the ELG Rule.

15 NIPSCO's Environmental Compliance Project, however, only includes
16 components that address CCR Rule requirements. Thus, the Environmental
17 Compliance Project will not be affected by the EPA's actions toward the
18 ELG Rule.

1 **Q6. How will NIPSCO address the ELG Rule delay, and potential change?**

2 A6. Although the deadlines for the ELG Rule have been stayed and EPA is
3 reconsidering the rule, the rule has not been rescinded. NIPSCO believes
4 that the ELG Rule will eventually include requirements that NIPSCO will
5 need to address. The EPA's administrative stay discussed above has made
6 those future requirements uncertain.

7 **Q7. When will we know more about the action EPA will be proposing to take?**

8 A7. EPA published the notice of an administrative stay of ELG deadlines and
9 the notice of a proposed rulemaking to postpone the ELG deadlines in the
10 Federal Register. Additionally, the Fifth Circuit Court of Appeals granted
11 EPA's motion to hold litigation related to the ELG Rule in abeyance for 120
12 days, until August 12, 2017. The agency intends to inform the Court of the
13 portions of the rule, if any, that it seeks to have remanded to the agency for
14 further rulemaking by August 12, 2017.

15 **Q8. Where does NIPSCO currently stand with respect to compliance with the**
16 **requirements of the ELG Rule at its generating stations?**

17 A8. The ELG Rule applies to all four (4) of NIPSCO's electric generating
18 stations. Sugar Creek's current operation and pollution control technology

1 will be able to meet the ELG Rule with only minor changes, the costs for
2 which NIPSCO is not seeking to recover in this proceeding. Bailly
3 Generating Station, Michigan City Generating Station, and R.M. Schahfer
4 Generating Station do not currently meet the requirements of the ELG Rule.

5 Because Bailly Generating Station is scheduled to close in 2018, there are no
6 known projects that will be required to be implemented at Bailly
7 Generating Station for compliance with the ELG Rule.

8 At Michigan City Generating Station, with the installation of Remote Ash
9 Conveying facilities being installed to comply with the CCR Rule, and the
10 installation and startup of the dry FGD unit at Michigan City Generating
11 Station, NIPSCO also anticipates that there will be no projects required for
12 ELG compliance.

13 Thus, at this time, it appears NIPSCO's only generating station with
14 projects resulting from the ELG Rule is R.M. Schahfer Generating Station.

15 **Q9. What compliance projects are being evaluated to meet only the ELG Rule**
16 **requirements?**

1 A9. There are two (2) projects being evaluated for ELG compliance: (1) a project
2 that would result in having zero liquid discharge (called "ZLD") at R.M.
3 Schahfer Generating Station and (2) a project that moves bottom ash
4 transport water into NIPSCO's existing FGD system at R.M. Schahfer
5 Generating Station. The evaporator technology associated with the ZLD
6 Project is intended to manage the ELG Rule requirements associated with
7 FGD wastewater. These two projects are not necessary to meet the
8 requirements of the CCR Rule. They are also not addressed by the
9 Settlement reached by the Settling Parties that has been submitted to the
10 Commission for approval. As NIPSCO Witness Timothy R. Caister
11 discusses, these types of projects, as well as compliance with the ELG Rule
12 generally, will be addressed by NIPSCO at a later time.

13 **Q10. And what is the status of NIPSCO's review of options available for**
14 **compliance with the ELG Rule?**

15 A10. As noted in my direct testimony, NIPSCO's current treatment system for
16 FGD wastewater at R.M. Schahfer Generating Station does not meet the
17 requirements of the ELG Rule. Under the ELG Rule, NIPSCO will be
18 required to either upgrade its existing wastewater treatment plant and

1 install biological treatment before discharge, or install ZLD technology. At
2 this time, NIPSCO's analysis indicates that installing ZLD technology may
3 be the most appropriate technology to use at R.M. Schahfer Generating
4 Station, but NIPSCO's technological evaluations are ongoing. These
5 ongoing pre-construction activities began in late 2016 and will continue for
6 several years (likely through the end of 2019). The status of project and
7 technology evaluation is further discussed by NIPSCO Witness Kurt W.
8 Sangster.

9 **Q11. How is NIPSCO proposing to handle the projects that were designed**
10 **solely for compliance with the ELG Rule?**

11 A11. As further discussed by NIPSCO witness Caister, NIPSCO proposes to
12 move review of NIPSCO's compliance with the ELG Rule, as well as the
13 status of the ELG Rule, to the ongoing review in the FMCA proposed in this
14 proceeding. When there is a reasonable amount of certainty related to the
15 ELG Rule (or successor or as potentially amended), then NIPSCO will
16 propose to the Commission to review and approve and issue a CPCN for
17 the updated cost estimates for any associated, federally mandated projects
18 for compliance with the ELG Rule.

1 **Changes to the CCR Rule**

2 **Q12. Did the Utility Solid Waste Activities Group submit a petition to EPA on**
3 **the CCR Rule since the filing of NIPSCO's initial testimony?**

4 A12. Yes. On May 12, 2017, the Utility Solid Waste Activities Group ("USWAG")
5 submitted a Petition for Reconsideration of the CCR Rule. USWAG did not
6 request reconsideration of the entire CCR Rule or question EPA's authority
7 to issue a rule, but focused on those provisions that were established based
8 on the self-implementing nature of the Rule and now, as a result of the
9 Water Infrastructure Improvements for the Nation Act ("WIIN Act"), will
10 be enforced by states or the EPA. USWAG also requested that EPA extend
11 the CCR Rule's compliance deadlines. USWAG did not petition EPA to stay
12 the CCR Rule, and, thus, the rule will almost certainly remain in effect
13 without issuance of a stay during EPA review. EPA has no specific deadline
14 to respond to the USWAG Petition for Reconsideration, and it is uncertain
15 whether the EPA's response to the Petition will change the requirements or
16 the compliance timeline of the CCR Rule. NIPSCO must continue to
17 implement the Environmental Compliance Project based on current
18 regulatory requirements and impending compliance deadlines.

1 **Q13. Even if the EPA were to accommodate this request, would you expect it**
2 **to impact NIPSCO's plan for compliance with the CCR Rule?**

3 A13. No. The projects that make up NIPSCO's plan for compliance with the CCR
4 Rule (which are referred to collectively in the Settlement Terms as the
5 "Environmental Compliance Project") include the following: (1) Ground
6 Water Monitoring Projects at the Bailly Generating Station, the Michigan
7 City Generating Station, and the R.M. Schahfer Generating Station; (2) the
8 Material Management Area Projects at the Michigan City Generating
9 Station and the R.M. Schahfer Generating Station; (3) the Process and Storm
10 Water Pond Project at the R.M. Schahfer Generating Station; (4) the Landfill
11 – Pond Closure Project at the R.M. Schahfer Generating Station; and (5) the
12 Remote Ash Conveying Projects at the Michigan City Generating Station
13 and the R.M. Schahfer Generating Station. Each of these is very likely to
14 still be required, no matter the outcome of the EPA's review of the industry
15 petition.

16 **NIPSCO's Environmental Compliance Project**

17 **Q14. Please briefly describe the requirements of the CCR Rule that are**
18 **intended to be addressed by each project.**

1 A14. Ground Water Monitoring Projects: This Project at all three (3) generating
2 stations is intended to satisfy the requirements of the CCR Rule to evaluate
3 groundwater quality relative to potential impact from the surface
4 impoundments and landfills regulated by the CCR Rule. Surface
5 impoundments and landfills regulated by the CCR Rule are required to
6 install a groundwater well monitoring network and have eight (8) samples
7 taken from each well no later than October 17, 2017. Once a groundwater
8 monitoring system has been established, groundwater monitoring and, if
9 necessary, corrective action must be conducted throughout the active life
10 and post-closure care period of the CCR unit.

11 Material Management Area Projects: This Project at the Michigan City
12 Generating Station and the R.M. Schahfer Generating Station is intended to
13 allow for contained management and temporary storage of CCR materials.
14 Placement of CCR material on the ground surface would meet the CCR
15 Rule definition of a CCR Landfill. Constructing a Material Management
16 Area will allow NIPSCO to conduct management and temporary storage of
17 CCR materials, thereby avoiding the extensive and costly requirements
18 associated with a CCR landfill.

1 Process and Storm Water Pond Project: This Project at the R.M. Schahfer
2 Generating Station is intended to provide a non-CCR regulated pond to
3 manage process and storm water at the station. This is necessary because
4 NIPSCO expects that conditions at the station will not allow for continued
5 use of existing CCR surface impoundments for this purpose.

6 Landfill – Pond Closure Project: This Project at the R.M. Schahfer
7 Generating Station will allow NIPSCO to construct and/or modify the
8 landfill to comply with the stricter landfill requirements of the CCR Rule.
9 It includes only the incremental work and costs necessary to comply with
10 the CCR Rule.

11 The Remote Ash Conveying Projects are described immediately below.

12 **Q15. How will the Remote Ash Conveying Project allow NIPSCO to meet the**
13 **CCR Rule requirements?**

14 A15. NIPSCO's Environmental Compliance Project includes a submerged flight
15 conveyer system ("SFCS") designed to manage bottom ash. (This SFCS is
16 part of the Remote Ash Conveying Projects.) The SFCS meets the CCR
17 Rule's requirements by eliminating the need for surface impoundments.
18 Although final determinations have not been made, NIPSCO's preliminary

1 findings indicate the CCR Rule will prohibit future use of the existing active
2 CCR surface impoundments at the Michigan City Generating Station and
3 R.M. Schahfer Generating Station. The SFCSs for both Michigan City
4 Generating Station and R.M. Schahfer Generating Station were designed as
5 closed loop recycle systems.

6 **Q16. Does NIPSCO intend to install a SFCS at R.M. Schahfer Generating**
7 **Station to meet the CCR Rule requirements for bottom ash management?**

8 A16. Yes. NIPSCO has evaluated alternatives to manage bottom ash to comply
9 with the CCR Rule and intends to install the SFCS at R.M. Schahfer
10 Generating Station. NIPSCO believes that the SFCS is the best alternative
11 to comply with the CCR Rule requirements at the R.M. Schahfer Generating
12 Station.

13 **Q17. Are there other benefits to installing the SFCS at R.M. Schahfer**
14 **Generating Station?**

15 A17. Yes. The SFCS will be flexible enough to be adjusted to meet potential
16 future environmental requirements. Although the EPA is reconsidering the
17 ELG Rule's prohibition on discharging bottom ash transport water, the
18 existing ELG Rule currently includes a prohibition on discharge of bottom

1 ash transport water. It is not certain that EPA will eliminate this
2 requirement. Other options for managing the CCR Rule requirements for
3 bottom ash do not provide similar flexibility to meet future environmental
4 requirements. NIPSCO witness Sangster's Revised Direct Testimony
5 provides a further discussion on this point.

6 **Q18. Does NIPSCO intend to install a SFCS at Michigan City Generating**
7 **Station to meet the CCR Rule requirements for bottom ash management?**

8 A18. Yes. NIPSCO has evaluated alternatives to manage bottom ash to comply
9 with the CCR Rule and intends to install SFCS at the Michigan City
10 Generating Station. NIPSCO believes that the SFCS is the best alternative
11 to comply with the CCR Rule at the Michigan City Generating Station.
12 NIPSCO witness Sangster's Revised Direct Testimony provides a further
13 discussion on this point.

14 **Q19. Does installing the SFCS at Michigan City Generating Station allow**
15 **NIPSCO to meet any other requirements?**

16 A19. Yes. NIPSCO's federally mandated National Pollution Discharge
17 Elimination System ("NPDES") permit for Michigan City Generating
18 Station prohibits the "discharge of pollutants in fly ash or bottom ash

1 transport water" beginning on November 1, 2018. See NIPSCO Michigan
2 City Generating Station NPDES Permit Part I, section 4b. This is the best
3 technological option to allow NIPSCO to comply with the prohibition of
4 bottom ash transport water by both the CCR Rule and the Michigan City
5 Generating Station's NPDES Permit.

6 **Q20. What are the relevant compliance deadlines under the CCR Rule?**

7 A20. The CCR Rule contains varying deadlines for compliance obligations, some
8 of which had to be met by the Rule's effective date of October 19, 2015, while
9 compliance with other more complex requirements is not required until
10 years after the initial compliance date, such as the installation and initiation
11 of a groundwater monitoring program, which is required by October 17,
12 2017. The CCR Rule timeline for ceasing receipt and initiating closure of a
13 CCR unit is based on events and technical criteria (safety factors,
14 groundwater standards, or location restrictions). NIPSCO has not
15 identified safety issues that would cause NIPSCO to initiate closure of a
16 CCR unit. With regard to groundwater standards and location criteria, the
17 earliest date that an existing unlined CCR surface impoundment could be

1 required to cease receipt of CCR material and initiate closure is
2 approximately January 17, 2019.

3 **Q21. If NIPSCO were to delay its work, would it be able to meet all the**
4 **compliance deadlines under the CCR Rule?**

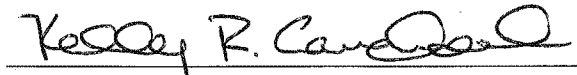
5 A21. Likely not. First, EPA has not taken any action related to the CCR Rule, like
6 it has for the ELG Rule, and no compliance deadlines have been stayed.
7 Thus, the deadlines mentioned immediately above must be complied with.
8 It is my understanding that if NIPSCO were to delay work, even by a few
9 months, it would risk being noncompliant with the CCR Rule. This would
10 then necessitate that NIPSCO shut down generating units based on the
11 requirement to cease receipt of CCRs to regulated units. This is further
12 discussed by NIPSCO witness Sangster.

13 **Q22. Does this conclude your prefiled settlement testimony?**

14 A22. Yes.

VERIFICATION

I, Kelly R. Carmichael, Vice President, Environmental for NiSource Corporate Services Company, affirm under penalties of perjury that the foregoing representations are true and correct to the best of my knowledge, information and belief.

A handwritten signature in black ink, appearing to read "Kelly R. Carmichael", written over a horizontal line.

Kelly R. Carmichael

Date: June 22, 2017

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CLEAN WATER ACTION, *et al.*,

Case No. 17-1193

Petitioners,

v.

E. SCOTT PRUITT, Administrator,
U.S. Environmental Protection Agency
and U.S. ENVIRONMENTAL
PROTECTION AGENCY

Respondents.

EXHIBIT 4

**Letter from Linda T. Landis to Mark Stein re:
Merrimack Station NPDES AR-1388 (Apr. 20, 2017)**

AR-1388

USCA Case #17-1193

Document #1720468

Filed: 03/02/2018

Page 2 of 3



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Senior Counsel,
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603-634-2700

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April 20, 2017

Mr. Mark A. Stein, Esq.
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency – Region 1
Office of Regional Counsel, Region 1
5 Post Office Square, Suite 100 (CIP)
Boston, Massachusetts 02109-3912

**RE: Public Service Company of New Hampshire
Merrimack Station, Bow, New Hampshire
Draft NPDES Permit No. NH0001465**

Dear Attorney Stein:

On February 17, 2017, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") submitted a plan to the Environmental Protection Agency, Region 1 ("EPA") describing how Merrimack Station would comply with the requirements set out in the Effluent Limitations Guidelines for the Steam Electric Power Plant industrial category ("ELG Rule") related to the handling of bottom ash transport water. PSNH's compliance plan included a tentative schedule which targeted a completion date of 2022 subject to a number of factors, including the pending divestiture of Merrimack Station. However, PSNH did not factor in the highly significant decision on April 14, 2017, by the EPA Administrator to stay the ELG Rule's compliance deadlines while the Rule itself is reconsidered.

As a result of this action by the EPA Administrator requiring the reconsideration of the ELG Rule, PSNH is providing formal notification to EPA, as we discussed on April 18th, that it will delay the implementation of the work described in its February 17th filing until such time as there is clarity in the content and timing of a potentially very different, less onerous regulation. We believe that such a delay during this administrative stay is reasonable given these significant developments.

USCA Case #17-1193

Document #1720468

Filed: 03/02/2018

Page 3 of 3

Please call me if you would like to discuss this further.

Very truly yours,



Linda T. Landis
Senior Counsel

cc: William H. Smagula, P.E., Vice President-Generation, Eversource Energy
Elizabeth H. Tillotson, Eversource Energy
Allan G. Palmer, Eversource Energy
Bradley Owens, Eversource Energy
Spencer M. Taylor, Esq., Balch & Bingham LLP
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Thomas G. DeLawrence, Esq., Balch & Bingham LLP

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CLEAN WATER ACTION, et al.,

Petitioners,

v.

E. SCOTT PRUITT, Administrator, U.S.
Environmental Protection Agency, et al.,

Respondents.

Case No. 17-1193

**RESPONDENTS' REPLY IN SUPPORT OF MOTION TO LIFT
ABEYANCE AND TO DISMISS, OR ALTERNATIVELY TO TRANSFER**

Petitioners insist that this Court should keep this case on its docket and continue to hold it in abeyance even though EPA has withdrawn the challenged action, and even though the case is required to be in a different court if there is somehow any remaining live controversy. The Court should lift the abeyance and dismiss the case as moot or, in the alternative, transfer the case and allow the Fifth Circuit to decide jurisdiction.

I. Abeyance Should Be Lifted

Petitioners argue that this case should remain in abeyance pending related district court proceedings. But mootness is a jurisdictional issue that EPA is entitled to raise at any time, and nothing the district court can do can revive this controversy. Besides, the district court has not yet ruled on its pending motions

concerning jurisdiction; if this Court decides the issue, the district court's resources could be conserved. Abeyance should be lifted to allow dismissal for lack of jurisdiction.

Alternatively, this Court should lift the abeyance and transfer this case, upon which the Fifth Circuit can determine whether to hold the case in abeyance or whether a jurisdictional ruling is appropriate at this time. This Court took a similar approach in the related case that it recently transferred, *Clean Water Action v. Pruitt (Clean Water Action III)*, No. 17-1216 (D.C. Cir.). This Court granted EPA's motion to transfer without deciding the petitioners' motion to hold the case in abeyance pending district court proceedings, which EPA had opposed on the basis that the district court lacked jurisdiction.¹ *Clean Water Action III*, Doc. No. 1716063 (order). This Court indicated to the Fifth Circuit that the motion for abeyance remained pending for its consideration upon transfer. *Clean Water Action III*, Doc. No. 1716068 at 1 (letter transferring case). Proceeding similarly here would require minimal expenditure of this Court's resources because transfer requires only a limited inquiry into the procedural connection between the § 705 Notice challenged in this petition and the ELG Rule challenged in the Fifth Circuit.

¹ Unlike this case, EPA did not argue that the *Clean Water Action III* petition was moot or otherwise lacking in jurisdiction.

See EPA Mot. at 15–16, Doc. No. 1718714; *infra* pp. 9–10. The Fifth Circuit can then decide for itself whether continuing to hold this case in abeyance is warranted.

II. This Case Should Be Dismissed for Mootness

A. The ELG Rule Amendment mooted this case.

The ELG Rule Amendment withdrew the § 705 Notice, rendering this case moot. *See, e.g., Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1164–65 (D.C. Cir. 1984); *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 680 F.2d 810, 813–14 (D.C. Cir. 1982); *Relf v. Weinberger*, 565 F.2d 722, 726–27 (D.C. Cir. 1977) (per curiam).

Petitioners claim that this case is not moot because of the principle that voluntary cessation moots a case only if “(i) ‘there is no reasonable expectation . . . that the alleged violation will recur,’ and (ii) ‘interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.’” *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016) (quoting *Am. Bar Ass’n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011)).

There is no reasonable expectation that the alleged violation will recur. Petitioners offer mere speculation and conjecture that EPA will reissue a stay of the ELG Rule under 5 U.S.C. § 705. “[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the

challenged law likely will be reenacted.” *Chamber of Commerce v. EPA*, 642 F.3d 192, 209 (D.C. Cir. 2011) (quoting *Nat’l Black Police Ass’n v. D.C.*, 108 F.3d 346, 349 (D.C. Cir. 1997)). Lacking any such evidence, Petitioners speculate that EPA might feel a “need” for another stay if the ELG Rule Amendment is invalidated. But this Court rejected such an argument in *Chamber of Commerce*, 642 F.3d 192, where it held that a challenge to a waiver of federal preemption allowing California to enforce its own motor-vehicle standards was moot after EPA enacted new federal standards and California withdrew its standards in favor of the federal standards. The Court rejected the argument that California might reenact its standards if EPA’s federal standards were invalidated, as federal regulations receive “the usual presumption of validity” so “the possibility that they may be invalidated is nothing more than speculation.” *Id.* at 208. Even if the ELG Rule Amendment were invalidated, it is mere speculation that EPA would issue another § 705 stay of the ELG Rule rather than taking some other course, such as extending deadlines through another rulemaking.

Similarly, there is no reasonable expectation that EPA would issue another § 705 stay if its reconsideration of the ELG Rule is not complete at the beginning of the postponed compliance dates in the ELG Rule Amendment. Petitioners point to EPA’s statement in the ELG Rule Amendment that it would “further postpone” compliance deadlines if it did not complete the reconsideration rulemaking in the

anticipated time period. 82 Fed. Reg. 43,494, 43,498 n.6 (Sept. 18, 2017).

Petitioners misread that statement, which contemplates additional rulemaking to further postpone compliance deadlines if EPA does not complete reconsideration before the revised deadlines. Even if the statement could be read as ambiguous, there is no reason to assume that it is more likely that EPA would issue another § 705 stay instead of using rulemaking authority.

Even if EPA were to issue another § 705 stay of the ELG Rule, EPA could only do so upon an inherently fact-based determination that “justice so requires.” 5 U.S.C. § 705. Any subsequent § 705 stay would necessarily be based on a new administrative record with different facts and a different rationale. Should such a circumstance arise, Petitioners could challenge that decision in an appropriate court. This Court should not venture an advisory opinion about the merits of a hypothetical decision based on a different administrative record.

Additionally, interim events — specifically, the issuance of the ELG Rule Amendment — have completely and irrevocably eradicated the effects of the alleged violation and there is no continuing harm to Petitioners. Petitioners claim continuing harm from delays in implementation of the new, more stringent limits and standards in the ELG Rule. For example, Petitioners speculate that because of the § 705 Notice, state permitting authorities may issue permits that require compliance dates that are later than they would be otherwise. But if there were any

such present harm, that would be the result of the ELG Rule Amendment, as the § 705 Notice no longer has any legal force or effect.

Petitioners' citation of a Nebraska permit only serves to illustrate this point. Petitioners contend that a draft Nebraska permit cited the § 705 Notice as a basis for a December 31, 2023 compliance date for bottom ash transport water limits. The draft permit was issued on July 27, 2017, when the § 705 Notice was still in effect. However, the final permit was issued after the § 705 Notice was withdrawn and does not cite the § 705 Notice.

For similar reasons, the fact that utilities in Indiana and New Hampshire delayed projects to comply with the ELG Rule is not evidence of continuing harm from the § 705 Notice. The cited statements are dated April 20 and June 22, 2017, before the § 705 Notice was withdrawn. Whatever the utilities' plans were in April and June 2017, their purported reliance on the § 705 Notice when the notice was still in effect does not show any continuing effect of the notice after its withdrawal. As of September 18, 2017, the date of the ELG Rule Amendment, power plants and permit writers are bound by the compliance dates in the ELG Rule Amendment and not in the § 705 Notice. Any project delay persisting today is attributable to the ELG Rule Amendment. Thus, unlike in *American Federation of Government Employees v. Reagan*, 870 F.2d 723, 726 (D.C. Cir. 1989), Petitioners can point to no collateral consequences from the § 705 Notice.

B. The “capable of repetition yet evading review” exception does not apply.

The § 705 Notice is not capable of repetition, yet evading review. This case is not controlled by *Environmental Defense Fund, Inc. (“EDF”) v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983). First, EPA does not concede here, as it did in *EDF, id.* at 810, that the challenged action is inherently too short in duration to allow for review. While the § 705 Notice was withdrawn before this case was fully litigated, that does not mean that a stay under § 705 is inherently so short-lived as to evade review. *See Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (exception applies to claims that are inherently short-lived).

Second, in contrast to *EDF*, there is no reasonable expectation that the challenged violation is likely to be repeated. *See supra* pp. 3–5. Overcoming mootness requires “not merely a ‘physical or theoretical possibility’ of recurrence, but a ‘reasonable expectation’ if not a ‘demonstrated probability’ that petitioners will be subject to the same action.” *Pub. Utilities Comm’n v. FERC*, 236 F.3d 708, 714–15 (D.C. Cir. 2001). In *EDF*, there was reasonable expectation of recurrence because EPA had issued thirty-six deferrals and suspensions of similar RCRA permitting requirements in the prior two years. 713 F.2d at 811 & n.20. In contrast, Petitioners point to no pattern or practice of delays in implementing effluent limitations guidelines under the Clean Water Act.

The “capable of repetition” exception is not so broad as to sanction judicial review of Petitioners’ generalized grievance that the government may issue a stay “in a future rulemaking under *any* statute.” Pet’rs’ Opp. at 16, Doc. No. 1720468 (emphasis added). The issue in *EDF* was whether it was “likely [that EPA would] refuse to call in [RCRA] permits under standards for other hazardous waste facilities.” 713 F.2d at 811. The Court concluded, in light of “EPA’s history of deferrals and suspensions *under RCRA*,” that there was a reasonable likelihood that the plaintiffs would be subjected to the same harm again. *Id.* (emphasis added). *EDF* does not provide that Petitioners have a justiciable interest in broadly challenging the use of § 705 to stay agency action pending judicial review.² Petitioners offer nothing more than speculation that the violation alleged in this case will recur and that it will evade review.³

² Petitioners claim a “recent practice” by the government of issuing § 705 stays, Pet’rs’ Opp. at 9–10, 16, but they cite three actions by three different agencies to postpone rules promulgated under statutes that have no relationship to one another. Only one of the three is an EPA action under the Clean Water Act and it involves an entirely different part of the statute — a general permit for municipal stormwater discharges — than the ELGs for power plants that are at issue in this case. *See id.* at 9–10 (citing *Mass. Rivers All. v. Pruitt*, No. 1:17-cv-11825 (D. Mass.)).

Moreover, EPA has taken no action to moot the § 705 stay in that case, undermining Petitioners’ theory that § 705 stays are inherently too short-lived to be litigated.

³ Petitioners accuse EPA of impropriety by “quickly issuing an unlawful stay and then issuing a replacement rule before judicial review of the unlawful stay can be completed.” Pet’rs’ Opp. at 17. But there is nothing inherently unlawful about

III. Alternatively, This Case Must Be Transferred

Petitioners unconvincingly attempt to distinguish this Court's order transferring the related petition in *Clean Water Action III*. Petitioners argue that their challenges to the ELG Rule and the ELG Rule Amendment both raised legal issues under the Clean Water Act, while their challenge to the § 705 Notice concerns EPA authority under the APA. But transfer under 28 U.S.C. § 2112(a) does not turn on what legal arguments the parties might raise on the merits. In *BASF Wyandotte Corp. v. Costle*, the First Circuit recognized that § 2112(a)(5) is best applied using a “mechanical rule easy of application” that avoids looking into the “often complicated substantive content” of the agency actions and limits its focus to “an evaluation of the background proceedings out of which the regulations arose.” 582 F.2d 108, 111–12 (1st Cir. 1978). Focusing as such on the procedural relationship between two agency actions, this Court has treated agency actions as part of the “same order” for purposes of § 2112(a) when the actions arose from closely interrelated agency proceedings even when “the particular subject matter of the two petitions [wa]s not the same.” *Am. Civil Liberties Union v. FCC*, 486 F.2d 411, 414 (D.C. Cir. 1973). In examining the *procedural* relationships between the

EPA exercising its § 705 authority to stay action pending judicial review when justice so requires. Even if EPA's § 705 Notice were defective, it was not improper for EPA to supersede it with new rulemaking. *See Ctr. for Sci. in the Pub. Interest*, 727 F.2d at 1164.

challenged actions, it is apparent that the § 705 Notice is closely interrelated with the ELG Rule, even more so than the ELG Rule Amendment challenged in the *Clean Water Action III* petition that this Court has already transferred.

Petitioners' attempt to collaterally attack this Court's *Clean Water Action III* order also lacks merit. Petitioners' argument boils down to the same overly narrow understanding of § 2112(a) that they rely upon in attempting to distinguish the *Clean Water Action III* transfer order: that § 2112(a) transfer is appropriate only when the same legal issues are raised in two actions. But, as explained above, the focus of the transfer inquiry must be on the procedural relationship between the agency actions rather than the similarity in legal issues that may be raised in challenges to those actions. Because the § 705 Notice was a close follow-on action to the ELG Rule, the Fifth Circuit is familiar with the factual and procedural background out of which this action arose — and will be even more so now that this Court has transferred to it the *Clean Water Action III* petition.

Finally, Petitioners weakly suggest that the cases cited in the *Clean Water Action III* transfer order are “at least questionable,” Pet'rs' Opp. at 20, because they predate the 1988 amendment to § 2112(a) that adopted a random selection mechanism (in place of the previously used first-to-file rule) to choose between multiple courts of appeals in which petitions are filed. *Compare* Pub. L. No. 85-791, § 2, 72 Stat. 941 (original § 2112(a)), *with* Pub. L. No. 100-236, § 1, 101 Stat.

1731 (1988 amendment). Not so. Those decisions remain good law to the extent that they articulate standards for determining when two agency actions are part of the “same order” such that petitions challenging such actions belong in one court of appeals, which is a separate issue from how that single court of appeals should be selected. *See* S. Rep. No. 100-263 at 5, 1987 U.S.C.C.A.N. 3198, 3202 (“[The 1988 amendment] is not intended to change the practice of having sequential or closely related orders issued in the course of the same or interrelated administrative proceedings treated as ‘the same order’ and reviewed by the circuit court reviewing the initial order.”).

Respectfully submitted,

Dated: March 9, 2018

Of Counsel:

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Office of General Counsel

U.S. Environmental Protection
Agency

Washington, D.C.

JEFFREY H. WOOD

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Counsel for Respondents

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the word limit of Fed. R. App. P. 27(d)(2)(C) because it contains 2576 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word 2013 in Times New Roman fourteen-point font.

/s/ Tsuki Hoshijima

CERTIFICATE OF SERVICE

I certify that on March 9, 2018, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel of record registered to use the CM/ECF system.

/s/ Tsuki Hoshijima

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15
16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE DISTRICT OF ARIZONA
18

19 Center for Biological Diversity,

20 Plaintiff,

21 vs.

22 E. Scott Pruitt, in his official capacity as
23 Administrator of the U.S. Environmental
24 Protection Agency; and U.S.
25 Environmental Protection Agency,
26

27 Federal Defendants.
28

No. CV-18-50-TUC-JAS

**FEDERAL DEFENDANTS' REPLY
IN SUPPORT OF MOTION TO
DISMISS**

I. INTRODUCTION

Plaintiff disputes 33 U.S.C. § 1369(b)(1)(E)’s applicability to its challenges to the Environmental Protection Agency’s (EPA) 2017 Effluent Limitations Guidelines and Standards (ELG) Amendment Rule, 82 Fed. Reg. 43,494 (Sept. 18, 2017). Section 1369(b)(1)(E) provides that the courts of appeals have jurisdiction to review rules “approving or promulgating any effluent limitation or other limitation” issued under specified statutory authorities. 33 U.S.C. § 1369(b)(1)(E).¹ Plaintiff asserts that the ELG Amendment Rule falls outside Section 1369 and that Federal Defendants, in arguing otherwise, are advocating for a novel and sweeping expansion of this statutory provision. Plaintiff is wrong, as another district court recently held in *Clean Water Action v. Pruitt*, --- F.Supp.3d ---, 2018 WL 1865919 (D.D.C. Apr. 18, 2018), appeal filed (May 11, 2018).

In *Clean Water Action*, the court addressed the very same question pending before this Court—whether it has jurisdiction to review the ELG Amendment Rule.² Like Plaintiff, the plaintiffs in *Clean Water Action* sought to re-characterize the ELG Amendment Rule as merely postponing compliance deadlines for limitations applicable to two wastestreams that EPA initially set in the 2015 ELG Rule, 80 Fed. Reg. 67,838

¹ Section 1369(b)(1)(E) is relevant here, as the ELG Amendment Rule promulgates effluent limitations. But the rule also promulgates pretreatment standards under 33 U.S.C. § 1317, *see* 82 Fed. Reg. at 43,495, 43,496, which means that 33 U.S.C. § 1369(b)(1)(C) also applies. Because there are redundancies between Sections 1369(b)(1)(C) and (b)(1)(E)—the Clean Water Act (CWA), for example, provides that effluent limitations must comply with pretreatment requirements established under Section 1317, *see* 33 U.S.C. §§ 1311(b)(1)(A) and 1311(b)(2)(A)—we focus primarily on Section 1369(b)(1)(E).

² Plaintiff argues that *Clean Water Action* addressed a different legal question—whether to grant a motion to amend the complaint. Pls. Opp. at 10 n.2 (ECF 21). But the court performed the same inquiry—whether “plaintiffs’ proposed claims” challenging the ELG Amendment Rule “are futile *because this Court lacks jurisdiction to review them*” under Section 1369(b)(1)(E). *Clean Water Action*, 2018 WL 1865919, *5 (emphasis added); *see also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (futility inquiry concerns whether “the proposed claim would not survive a motion to dismiss”) (citation omitted).

1 (Nov. 3, 2015). *Clean Water Action*, 2018 WL 1865919, at *5. And, like Plaintiff, the
2 plaintiffs argued that a rule postponing compliance deadlines does not fall within
3 Section 1369(b)(1)(E)’s exclusive review provision. *Id.* The court rejected these
4 arguments and identified at least three reasons why the ELG Amendment Rule falls
5 within 33 U.S.C. § 1369(b)(1)(E) and is reviewable only in the courts of appeals.

6 First, the ELG Amendment Rule promulgates effluent limitations and
7 pretreatment standards for five wastestreams in the steam electric power plant industry.
8 In 2015, EPA established effluent limitations and standards, with associated compliance
9 deadlines, for six wastestreams. 80 Fed. Reg. at 67,841-42. In 2017, EPA stayed pending
10 judicial review the compliance deadlines applicable to five of the six wastestreams. 82
11 Fed. Reg. 19,005, 19,005-06 (Apr. 25, 2017). In the 2017 ELG Amendment Rule, EPA
12 lifted the stay and thus promulgated the same effluent limitations and standards, with the
13 same or different compliance deadlines. EPA retained the same limits and standards,
14 with their associated compliance deadlines, for three wastestreams (flue gas mercury
15 control wastewater, fly ash transport water, and gasification wastewater), and it retained
16 the same limits and standards and set new compliance deadlines for two other
17 wastestreams (bottom ash transport water and flue gas desulfurization wastewater). *See*
18 82 Fed. Reg. at 43,44-96, 43498, 43,500.³ Due to the intervening stay, the ELG
19 Amendment Rule thus promulgated effluent limitations and pretreatment standards (with
20 their associated restrictions) for five wastestreams “that were not in effect on the day
21 before the Amendment.” *Clean Water Action*, 2018 WL 1865919, *6 (citation omitted).

22 Second, the ELG Amendment Rule substantively revises the 2015 ELG Rule by
23 establishing new compliance dates for two wastestreams (bottom ash transport water and
24

25
26 ³ The 2015 Rule also required steam electric power plants to “comply with the new,
27 more stringent requirements no later than 2023, with plants expected to implement new
28 control technologies over a five-year compliance period of 2019-2023 according to their
permit renewal schedule.” 82 Fed. Reg. at 43,497. The stay removed this requirement,
and the ELG Amendment Rule re-imposed it. *Id.* at 43,496-97.

1 flue gas desulfurization wastewater), as well as promulgating different limits that apply
2 up until those new compliance dates. Under the 2015 ELG Rule, the new, more stringent
3 limits and standards for these two wastestreams did not apply until as soon as possible
4 beginning November 1, 2018; before that date, the rule established “legacy wastewater”
5 limits for those wastestreams. 80 Fed. Reg. at 67,854. In the ELG Amendment Rule, the
6 new, more stringent limits do not apply for a longer period of time—until as soon as
7 possible beginning November 1, 2020—and the legacy wastewater limits now apply up
8 until at least that extended date. 82 Fed. Reg. at 43,499-500. Thus, for the period
9 between November 1, 2018, and November 1, 2020, the 2015 ELG Rule established
10 different effluent limits than the ELG Amendment Rule, which means that the latter rule
11 “approves or promulgates different limitations related to the discharge of pollutants.”
12 *Clean Water Action*, 2018 WL 1865919, at *6 (analogizing the ELG Amendment Rule
13 to a rule that alters speed limits on a road).

14 Third, Section 1369(b)(1)(E) applies to rules promulgated under specified
15 statutory authorities, including 33 U.S.C. § 1311. The ELG Amendment Rule, in turn,
16 was promulgated under Section 1311 (and related authorities). *Clean Water Action*, 2018
17 WL 1865919, at *7; *see* 82 Fed. Reg. at 43,496 (among other authorities, invoking
18 Section 1311(d)’s authority for EPA “review and revis[ion] of effluent limitations”).

19 As *Clean Water Action* confirms, the ELG Amendment Rule approves or
20 promulgates effluent limitations and standards and thus constitutes precisely the type of
21 rule that Congress intended to be reviewed only in the courts of appeals. 33 U.S.C. §
22 1369(b)(1)(E). Congress’ judgment expressed in Section 1369(b)(1)(E) must be given
23 effect, which means that this Court should dismiss this suit for lack of subject matter
24 jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

25 II. ARGUMENT

26 Congress intended for challenges to rules, like the ELG Amendment Rule, to be
27 brought only in the courts of appeals. Plaintiff disagrees and predicates its opposition on
28 two overarching points: the ELG Amendment Rule does not impose effluent or other

1 limitations but relieves or eliminates restrictions, and the Supreme Court's decision in
2 *National Ass'n of Manufacturers v. Department of Defense*, 138 S.Ct. 617 (2018), shows
3 that Section 1369(b)(1)(E) does not apply. Neither argument has merit.

4 **A. Plaintiff overstates *National Ass'n of Manufacturers'* relevance to the**
5 **question presented—whether Section 1369 applies to the ELG**
6 **Amendment Rule.**

7 Plaintiff relies heavily on *National Ass'n of Manufacturers*, where the Supreme
8 Court explained that Section 1369 is narrowly drawn and concluded that this provision
9 does not apply to an EPA definitional rule. Plaintiff's reliance on this opinion is
10 misplaced; the Supreme Court neither addressed a rule analogous to the ELG
11 Amendment Rule nor suggested that rules like the ELG Amendment Rule fall outside
12 the scope of Section 1369(b)(1)(E)'s exclusive review provision.

13 In *National Association of Manufacturers*, the Court evaluated whether an EPA
14 rule that defined the statutory term “waters of the United States” approved or
15 promulgated effluent limitations or other limitations under Section 1369(b)(1)(E). 138 S.
16 Ct. at 624. The EPA rule at issue there did “not establish any regulatory requirements”
17 relating to effluent limitations. *Id.* at 626, 628. Instead, the Court addressed whether the
18 rule nonetheless constitutes an “other limitation” falling within Section 1369(b)(1)(E).
19 *Id.* at 628-29. The Court held that it did not, explaining that “other limitations” as used
20 in Section 1369(a)(1)(E) “must be similar in kind to an ‘effluent limitation’: that is, a
21 limitation related to the discharge of pollutants.” *Id.* at 628. And the Court found that
22 EPA's “‘definitional rule that clarifies the scope of’ [a] statutory term” did not constitute
23 such a limitation. *Id.* at 626, 628. Finally, the Court concluded that policy arguments
24 surrounding judicial review in the courts of appeals cannot expand Section 1369 to cover
25 actions that do not fall within its scope. *Id.* at 630-31.

26 In contrast to *National Ass'n of Manufacturers*, EPA's ELG Amendment Rule
27 does not define a statutory term. EPA instead issued a substantive rule addressing
28 effluent limitations and standards applicable to five wastestreams that sets binding and

1 enforceable regulatory requirements on regulated entities. Plaintiff's focus on whether or
2 the extent to which Section 1369 is narrowly drawn therefore misses the point, as the
3 ELG Amendment Rule falls within Section 1369(b)(1)(E)'s plain terms. *Clean Water*
4 *Action* addressed this issue, distinguishing the ELG Amendment Rule from the rule at
5 issue in *National Ass'n of Manufacturers*:

6 The ELG Rule Amendment, [in] contrast [to the rule reviewed in *National*
7 *Ass'n of Manufacturers*], imposes enforceable duties and establishes
8 regulatory requirements, specifically the limitations discussed above.
9 Because the Amendment 'impose[s] restrictions on the discharge of certain
10 pollutants,' it falls within the ambit of Section 1369(b)(1)(E) ... In
accordance with *National Ass'n of Manufacturers*, this conclusion is
'grounded in the statutory text,' not any functional approach.

11 *Clean Water Action*, 2018 WL 1865919, at *7 n.7 (citing and quoting *Nat'l Ass'n of*
12 *Mfrs.*, 138 S.Ct. at 628, 630). Plaintiff thus overstates *National Ass'n of Manufacturers*'
13 relevance to this case and wrongly downplays *Clean Water Action* by suggesting that the
14 district court ignored the Supreme Court's decision. Pls. Opp. at 10-11 n.2.

15 Recognizing the importance of *Clean Water Action*, Plaintiff also argues the case
16 is distinguishable due to its "different procedural posture and claims." Pls. Opp. at 10
17 n.2. This argument fails for two reasons. First, as explained above, *Clean Water Action*
18 addressed the exact same issue before this Court—whether it has jurisdiction to review
19 the ELG Amendment Rule. 2018 WL 1865919, at *5. Second, the jurisdictional inquiry
20 under Section 1369 does not depend on the specific claims raised challenging the rule.
21 We addressed this law in our opening motion, *see* Fed. Defs. Motion to Dismiss at 9-11
22 (ECF 11), and Plaintiff does not dispute that the specific claims pled in its Complaint are
23 not relevant to the Court's jurisdictional inquiry, *see* Pls. Opp. at 16-17. *Clean Water*
24 *Action* thus cannot be dismissed on the basis of the different claims pled in that case.

25 At bottom, the Supreme Court cautioned against using policy notions to expand
26 Section 1369's scope. But the Court did not overturn prior precedent holding that courts
27 should not read the CWA's exclusive review provisions in a way that creates "a
28

1 seemingly irrational bifurcated system” of review. *Nat’l Ass’n of Mfrs.*, 138 S. Ct. at 633
2 (citation omitted). Yet that is exactly what Plaintiff hopes to accomplish in this case.
3 Plaintiff argues that a rule imposing greater restrictions on regulated entities is
4 reviewable only in the courts of appeals (subject to a 120-day statute of limitations), but
5 a rule that decreases limitations or lessens restrictions is reviewable in district courts
6 (subject to a six-year statute of limitations).⁴ And Plaintiff avoids what happens if a rule
7 simultaneously increases and decreases limitations or restrictions. Similarly, Plaintiff
8 does not dispute that the 2015 ELG Rule is reviewable only in the courts of appeals, but
9 illogically contends that a rule amending the 2015 ELG Rule is reviewable in the district
10 courts. The Court should reject these distinctions, as “nothing in the statute or its
11 legislative history suggest that Congress intended such an absurd result.” *United States*
12 *v. Fejes*, 232 F.3d 696, 701 (9th Cir. 2000).

13 **B. Plaintiff’s efforts to re-characterize and artificially narrow the ELG**
14 **Amendment Rule are legally and factually unsupported.**

15 Plaintiff’s remaining arguments advance claims that run counter to the plain
16 language of the ELG Amendment Rule and the CWA. Principally, Plaintiff argues that
17 the rule does not “change or otherwise amend the effluent limitations and guidelines,”
18 Pls. Opp. at 2, but instead “relieves a restriction” or results in the “elimination of a
19 restriction,” *id.* at 8-9. This argument myopically looks to one aspect of the ELG
20 Amendment Rule—postponing compliance deadlines for restrictions applicable to two
21 wastestreams—and ignores the rule’s other actions and effects. *See Clean Water Action*,
22 2018 WL 1865919, at *6-7 (explaining the rule’s other effects, including promulgating
23 effluent limitations and standards with their compliance deadlines for three other
24 wastestreams, and promulgating different effluent limitations applicable during the
25

26
27 ⁴ See *Nat’l Ass’n of Mfrs.*, 138 S. Ct. at 626-27 (explaining the difference, including
28 different statute of limitation periods, for rules reviewable in the courts of appeals and
those reviewable in the district courts).

1 period of postponement for two wastestreams). Plaintiff's references to the ELG
2 Amendment Rule prove this point, as Plaintiff omits key context in arguing that the rule
3 "does not ... amend the effluent limitations guidelines and standards." Pls. Opp. at 14
4 (quoting 82 Fed. Reg. at 43,495). Reinserting the omitted text, the rule identifies the
5 portions of the 2015 ELG Rule EPA did and did not revise. 82 Fed. Reg. at 43,495 (ELG
6 Amendment alters the 2015 Rule in certain ways, but "does not otherwise amend the
7 effluent limitation guidelines and standards" (emphasis added)).

8 Plaintiff's arguments fail for additional reasons. Section 1369(b)(1)(E) applies to
9 rules approving or promulgating "effluent limitations." 33 U.S.C. § 1369(b)(1)(E). The
10 CWA defines "effluent limitation" as "any restriction established by a State or the
11 Administrator [of EPA] on quantities, rates, and concentrations of chemical, physical,
12 biological, and other constituents which are discharged from point sources into
13 navigable waters, the waters of the contiguous zone, or the ocean. ..." *Id.* § 1362(11)
14 (emphasis added). Plaintiff asserts that, because EPA lessened the regulatory burdens for
15 two wastestreams, it "relieved" or "eliminated" restrictions and thus did not impose a
16 restriction. Pls. Opp. at 8. Plaintiff's distinction finds no home in the CWA.

17 As used in the CWA, a "restriction" denotes a binding and enforceable limitation
18 on actions or conduct; it does not depend on the *type* of limitation imposed (*i.e.*, whether
19 the limitation is higher or lower or less burdensome than prior limits). 33 U.S.C. §
20 1362(11); *see also* Black's Law Dictionary (10th ed. 2014) ("restriction" is defined as
21 "[c]onfinement within bounds or limits; a limitation or qualification"). For this reason,
22 courts do not look at the type of limitation imposed, but whether EPA imposes a
23 limitation in the first instance—*i.e.*, whether the regulation establishes "regulatory
24 requirements" or imposes an "enforceable duty" on regulated parties. *Nat'l Ass'n of*
25 *Mfrs.*, 138 S.Ct. at 628. Even the cases Plaintiff relies on highlight this foundational
26 inquiry under Section 1369. *See Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1015-
27 1016 (9th Cir. 2008) (evaluating whether the regulations "establish numerical limitations
28 and similar limits" or "procedures under which limitations on discharges of effluent

1 would be implemented”) (discussing *Nat. Res. Def. Council v. EPA*, 673 F.2d 400 (D.C.
2 Cir. 1982)); *Blue Water Balt. v. Pruitt*, 17-cv-1253, 2018 WL 704847, at *4 (D. Md.
3 Feb. 5, 2018) (finding EPA’s denial of petition is not akin to a regulation subject to
4 Section 1369 because it is not “binding on both the regulator and the regulated parties”);
5 *ONRC Action v. U.S. Bureau of Reclamation*, 97-cv-3090, 2012 WL 3526833, *25 (D.
6 Or. Jan. 17, 2012) (analyzing whether the rule sets enforceable limits by “guid[ing] the
7 setting of numerical limitations in [CWA] permits”), *aff’d*, 798 F.3d 933 (9th Cir. 2015).

8 EPA’s decision to alter compliance deadlines applicable to the two wastestreams
9 in the ELG Amendment Rule meets these criteria; it promulgates applicable limits and
10 standards, as well as compliance timeframes, for regulated parties. *See Clean Water*
11 *Action*, 2018 WL 1865919, at *6-7. Indeed, as EPA explained, the rule imposes
12 prospective, binding requirements that must be incorporated into CWA permits,
13 irrespective of any future rulemaking. *See* 82 Fed. Reg. 43,498 (“In light of the
14 compliance date postponements being finalized today, in determining the ‘as soon as
15 possible date,’ EPA believes it would be reasonable for permitting authorities to
16 consider the need for a facility to make integrated planning decisions regarding
17 compliance with the requirements for all of the wastestreams currently subject to new,
18 more stringent requirements in the 2015 Rule.”).⁵ Plaintiff thus errs in arguing that
19 altering compliance deadlines fails to impose any “restrictions.”

20 Plaintiff also identifies no support for the novel argument that EPA must “change
21 or otherwise amend” a prior restriction to “approve or promulgate” an effluent
22 limitation. Pls. Opp. at 2. Setting aside that the ELG Amendment Rule amends prior
23 effluent limitations, *see Clean Water Action*, 2018 WL 1865919, at *6, Plaintiff

24
25 ⁵ While unclear, Plaintiff suggests that EPA’s planned future rulemaking for two
26 wastestreams undermines the applicability of Section 1369. Pls. Opp. at 15. The ELG
27 Amendment Rule, however, establishes binding and enforceable effluent limitations for
28 five wastestreams. The possibility that EPA may prospectively alter some requirements
does not change this fact or otherwise remove the ELG Amendment Rule from the scope
of Section 1369. *See* 82 Fed. Reg. at 43,498-99.

1 disregards the plain meaning of “approve” and “promulgate.”

2 To “approve” means “[t]o give formal sanction to; to confirm authoritatively.”
3 Black’s Law Dictionary (10th Ed. 2014). To “promulgate” means “[t]o declare or
4 announce publically; to proclaim.” *Id.* The terms connote EPA action in formally setting
5 limits or restrictions; the terms do not depend on whether the limits or timing of such
6 restrictions differ from prior limits or restrictions. Here, regardless of the degree to
7 which EPA changed the 2015 ELG Rule, EPA gave formal sanction to and publically
8 announced the effluent limitations and standards for three wastestreams (that were first
9 promulgated in the 2015 ELG Rule but later stayed pending judicial review). 82 Fed.
10 Reg. at 43,496, 43,498 (re-imposing the 2015 limits and compliance dates announcing
11 that EPA does not intend to conduct further rulemaking for these three wastestreams).
12 For the other two wastestreams, EPA announced binding and enforceable limits and
13 standards and associated compliance deadlines (in a manner that differed from the 2015
14 ELG Rule). *Id.* at 43,496, 43,498, 43,500. This brings the ELG Amendment Rule within
15 the reach of Section 1369(b)(1)(E).

16 Plaintiff next cites various cases for the proposition that the ELG Amendment
17 Rule constitutes a separate, independently reviewable agency action. Pls. Opp. at 16.
18 True, but irrelevant. EPA’s issuance of a final rule does not address whether the final
19 rule approves or promulgates effluent limitations. Nor does Plaintiff’s argument show
20 that the ELG Amendment Rule constitutes a different type of rule than the 2015 ELG
21 Rule, which Plaintiff does not dispute is reviewable only in the courts of appeals. The
22 law typically makes no distinction “between initial agency action and subsequent agency
23 action undoing or revising that action,” *FCC v. Fox Television Stations*, 556 U.S. 502,
24 515 (2009), and Plaintiff cannot show that the CWA constitutes the exception. *See Nat.*
25 *Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) (“[A]ltering the
26 effective date of a duly promulgated standard could be, in substance, tantamount to an
27 amendment or rescission of the standards, which clearly falls within” the statute’s
28 exclusive review provision); *Clean Water Action*, 2018 WL 1865919, at *6 (“Changing

1 a compliance deadline is ‘tantamount to amending ... a rule.’” (quoting *Clean Air*
2 *Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017)).

3 Plaintiff labors to distinguish cases, such as *Abraham*, by arguing that the case
4 involved a more extensive exclusive review provision. Pls. Opp. at 15 (asserting
5 *Abraham* found that “‘most acts undertaken ... under [DOE’s] grant of authority ... are
6 subject to review by the court of appeals”) (quoting *Abraham*, 355 F.3d at 193). But
7 Plaintiff distorts *Abraham* through the use of ellipses. The court actually stated that
8 “most acts undertaken by DOE under its grant of authority regarding home appliances
9 are subject to review by the court of appeals.” 355 F.3d at 193 (emphasis added). This
10 provision mirrors the CWA’s exclusive review provision, which similarly authorizes
11 courts of appeals to review all EPA actions taken in approving or promulgating effluent
12 limitations. 33 U.S.C. § 1369(b)(1)(E). Similarly, Plaintiff argues that *Abraham*’s
13 jurisdictional ruling depended on the court having before it “the delay rule, the full
14 withdrawal of the rule, and the replacement of the rule.” Pls. Opp. at 15. But *Abraham*
15 explicitly declined to conflate the jurisdictional inquiry in this way. *Abraham*, 355 F.3d
16 at 191-92 (explaining that it must first address jurisdiction over the delay rule before
17 considering the merits). Plaintiff neither identifies a defect in *Abraham*’s analysis nor
18 overcomes its findings that rules altering effective dates—like portions of the ELG
19 Amendment Rule—effectively amend previously imposed standards.

20 Finally, Plaintiff attempts to sow confusion on EPA’s authority for issuing the
21 ELG Amendment Rule by speculating that “if EPA is relying on” its general rulemaking
22 authority in 33 U.S.C. § 1361(a), then Section 1369 does not apply. Pls. Opp. at 9
23 (emphasis added). Mere pages later, Plaintiff admits that Section 1311 governs by
24 arguing the rule must (but fails to) comply with that provision. *Id.* 13-14. Contrary to
25 Plaintiff’s claims, no ambiguity exists. EPA expressly relied on its authority in Section
26 1311 and related statutory provisions. *See* 82 Fed. Reg. at 43,496 (“Particularly relevant
27 here, the CWA expressly authorizes EPA to revise effluent limitations and standards,”
28 citing 33 U.S.C. § 1311(d) and similar authorities). By relying on Section 1311 to attack

1 the rule, Plaintiff concedes that the ELG Amendment Rule falls within the scope of
2 Section 1369. *See* 33 U.S.C. § 1369(b)(1)(E) (identifying rules promulgated under
3 Section 1311 as reviewable only in the courts of appeals). And Plaintiff errs in arguing
4 the Court should decide a merits question in order to determine whether it has
5 jurisdiction to review the merits of the rule. Once it is determined that the rule falls
6 within Section 1369's terms, the Court lacks jurisdiction and must dismiss the action.⁶

7 The ELG Amendment Rule promulgates effluent limitations and sets restrictions
8 for regulated parties, which are the hallmarks of EPA rules subject to the CWA's
9 exclusive review provision. 33 U.S.C. § 1369(b)(1)(E). Plaintiff's "mental gymnastics"
10 cannot, and should not, circumvent this congressional choice. *Clean Water Action*, 2018
11 WL 1865919, at *7.

12 **III. CONCLUSION**

13 Federal Defendants are not attempting to evade judicial review; the ELG
14 Amendment Rule, in fact, is currently pending before the Fifth Circuit. Federal
15 Defendants instead seek to give effect to Congress' judgment expressed in the Clean
16 Water Act—that suits challenging rules approving or promulgating effluent limitations
17 must be brought only in the courts of appeals. Because the rule falls within Section
18 1369(b)(1)(E), the Court lacks jurisdiction over the Complaint and should dismiss this
19 case.

20 DATED: May 18, 2018

21
22 JEFFREY H. WOOD,

23 ⁶ Nor are Plaintiff's arguments that the ELG Amendment Rule runs afoul of Section 1311
24 persuasive. Pls. Opp. at 13-14. Plaintiff contends that the CWA precludes EPA from
25 postponing a prior compliance deadline by more than three years. *Id.* But EPA addressed
26 this exact concern in issuing the ELG Amendment Rule. *See* Comment Response
27 Document at 7-9, available at www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-7088 (last visited May 18, 2018) (responding to comments and explaining why the
28 CWA authorizes the ELG Amendment Rule). Plaintiff ignores, and therefore cannot
overcome, EPA's reasoned findings in this regard (assuming, wrongly, this merits issue is
before this Court or ripe for judicial review).

1 Acting Assistant Attorney General
2 SETH M. BARSKY, Chief
3 MEREDITH L. FLAX, Assistant Chief

4 /s/ Michael R. Eitel
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13 *Attorneys for Federal Defendants*

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on May 18, 2018, I filed the foregoing with the Court's
16 electronic filing system, which will serve all counsel by electronic means.
17

18 /s/ Michael R. Eitel
19 Michael R. Eitel
20
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28

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5149**September Term, 2018****1:17-cv-00817-DLF****Filed On: November 20, 2018** [1760938]

Clean Water Action, et al.,

Appellants

v.

Andrew Wheeler, Acting Administrator, U.S.
Environmental Protection Agency, in his
official capacity, et al.,

Appellees

ORDER

Upon consideration of the joint motion asking the court to continue to hold this case in abeyance, it is

ORDERED that this case remain in abeyance pending further order of the court. Appellees are directed to file status reports at 60-day intervals beginning January 22, 2019. The parties are directed to file motions to govern further proceedings in this case within 30 days of the Fifth Circuit's disposition of Clean Water Action v. EPA, No. 18-60079.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Rebecca L. Thompson
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLEAN WATER ACTION, et al.,

Plaintiffs-Appellants,

v.

ANDREW WHEELER, in his official capacity
as Acting Administrator, United States
Environmental Protection Agency,
ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees,

UTILITY WATER ACT GROUP,

Intervenor for Defendant-Appellee.

No. 18-5149

JOINT MOTION ADDRESSING ABEYANCE

The Court’s order dated September 19, 2018, ordered that this appeal be held in abeyance pending further order and directed the parties “to file motion to govern future proceedings within 30 days of resolution of Clean Water Action v. EPA, No. 18-60079 (5th Cir.) or Clean Water Action v. EPA, No. 18-60619 (5th Cir.), whichever the Fifth Circuit resolves first.” The Fifth Circuit issued an order and judgment resolving Case No. 18-60619 on October 18, 2018 (attached). The parties accordingly file this joint motion asking the Court to continue to hold the appeal in abeyance pending action by the Fifth Circuit in Case No. 18-60079.

BACKGROUND

This appeal is one of a number of cases relating to three EPA actions. We briefly describe the actions and the related cases.

A. EPA's 2015 Guidelines Rule

On November 3, 2015, EPA promulgated the Steam Electric Power Generating Effluent Limitations Guidelines Rule (2015 Guidelines Rule), which established effluent limits under the Clean Water Act for six types of effluent waste streams generated by new and existing steam electric power plants. *See* Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838, 67,841-42 (Nov. 3, 2015). Seven petitions for review of the 2015 Guidelines Rule were filed, and the Judicial Panel on Multidistrict Litigation consolidated the petitions in the Fifth Circuit pursuant to 28 U.S.C.

§ 2112(a). Merits briefing is completed on some issues and oral argument was held on October 3, 2018, and other issues are stayed pending further agency action. *Southwest Elec. Power Co. v. EPA*, 5th Cir. No. 15-60821. Some of the Plaintiffs in the case on appeal here are also parties in the consolidated Fifth Circuit litigation.

B. EPA's April 2017 Stay

In April 2017, EPA issued a notice under Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, staying the compliance dates for certain effluent limitations established in the 2015 Guidelines Rule. *See* Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017). In the case on appeal here, Plaintiffs' complaint challenged the April 2017 Stay. Plaintiffs here also filed a "protective" petition for review of the April 2017 Stay in *Clean Water Action v. Pruitt*, D.C. Cir. No. 17-1193, to preserve their right to review of the April 2017 Stay in the event that the district court concluded that it lacked jurisdiction in the case on appeal here.

C. EPA's September 2017 Rule

In September 2017, EPA promulgated a rule that withdrew the April 2017 Stay and postponed compliance dates for a narrower set of effluent limitations in the 2015 Rule. *See* Postponement of Certain Compliance Dates for ELGs for Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494 (Sept. 18, 2017). The district court here held that, because the September 2017 Rule withdrew the April 2017 Stay, Plaintiffs' challenges to the April 2017 Stay were moot. *See Clean Water Action v. Pruitt*, 2018 WL 1865919, at *9-13 (D.D.C. Apr. 18, 2018).

In the related petition proceeding (D.C. Cir. No. 17-1193), EPA filed a motion to dismiss the petition as moot for the same reason that the district court here held

the case to be moot. In the alternative, EPA requested that the Court transfer the petition for review to the Fifth Circuit, where the challenges to the 2015 Guidelines Rule and challenges to the September 2017 rule are still pending. This Court granted the motion to transfer on July 23, 2018. In the attached order, the Fifth Circuit has now “ORDERED that Respondents’ motion to dismiss the petition for review for lack of jurisdiction is GRANTED.”

In the case on appeal here, Plaintiffs sought to supplement or amend their complaint to add a challenge to the September 2017 Rule. The district court denied that motion, holding that because the September 2017 Rule is one that falls within 33 U.S.C. § 1369(b)(1)(E), jurisdiction is exclusively in the court of appeals. *See* 2018 WL 1865919, at *5-8. The district court also held that the proposed claims would unduly delay and alter the scope of the litigation. *Id.* at *8-9.

In addition, Plaintiffs here also filed another protective petition for review in this Court challenging the September 2017 Rule, to preserve their right to judicial review of the September 2017 Rule in the event that the district court in the case on appeal here concluded that it lacked jurisdiction. This Court transferred that petition to the Fifth Circuit as well on February 1, 2018. *See Clean Water Action v. Pruitt*, 5th Cir. No. 18-60079, D.C. Cir. No. 17-1216. This case has now been fully briefed, with Plaintiffs’ reply brief having been filed on November 16, 2018. The parties’ joint appendix is due to be filed by December 6, 2018. The court has not yet set a date for oral argument.

ARGUMENT

The parties jointly ask this Court to continue to hold this appeal in abeyance. The Fifth Circuit has granted EPA's motion to dismiss the petition for review in Case No. 18-60619 as moot in the attached order. This ruling resolves the mootness issue that Plaintiffs had anticipated raising in the appeal here.

As to the issue on appeal here concerning the district court's denial of supplementation or amendment of the complaint for lack of jurisdiction, the merits of Plaintiffs' claims challenging the September 2017 Rule are now fully briefed in the Fifth Circuit (Case No. 18-60079). The parties agree that this Court should hold in abeyance Plaintiffs' appeal of the denial of their motion to amend and supplement the complaint until the Fifth Circuit issues a decision in Case No. 18-60079.

Respectfully submitted,

s/ Robert J. Lundman

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**Attachment: Order and Judgment in *Clean Water Action v. EPA*,
Fifth Circuit No. 18-60619, October 18, 2018**

United States Court of Appeals**FIFTH CIRCUIT
OFFICE OF THE CLERK****LYLE W. CAYCE
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600 S. MAESTRI PLACE
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October 18, 2018

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USCA Case #18-5149

Document #1760542

Filed: 11/19/2018

Page 10 of 13

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No. 18-60619 Clean Water Action, et al v. EPA, et al
USDC No. 82 Fed. Reg. 19,005

Dear Mr. Clark-Leach, Mr. Cmar, Mr. Dycus, Mr. Gerhart, Mr.
Hoshijima, Mr. Leopold, Mr. McDermott, Ms. Roberts, Mr. Smith,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara
By:

Lisa E. Ferrara, Deputy Clerk
504-310-7675

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



Certified as a true copy and issued
as the mandate on Oct 18, 2018

Attest: *Jyle W. Cuyler*
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 18-60619

CLEAN WATER ACTION; ENVIRONMENTAL INTEGRITY PROJECT;
SIERRA CLUB; WATERKEEPER ALLIANCE; PENNENVIRONMENT,
INCORPORATED; CHESAPEAKE CLIMATE ACTION NETWORK;
PHYSICIANS FOR SOCIAL RESPONSIBILITY, CHESAPEAKE,
INCORPORATED; PRAIRIE RIVERS NETWORK,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW
WHEELER, Acting Administrator of the United States Environmental
Protection Agency,

Respondents

Petition for Review of an Order of the
Environmental Protection Agency

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Respondents' opposed motion to dismiss the
petition for review for lack of jurisdiction is GRANTED.

CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A)

because it contains 955 words.

s/ Robert J. Lundman

Robert J. Lundman

United States Department of Justice

Environment and Natural Resources Div.

P.O. Box 7415

Washington, DC 20044

(202) 514-2496

robert.lundman@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing joint motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on November 19, 2018. I certify that the all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Robert J. Lundman

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United States Department of Justice

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951 East Byrd Street
Richmond, VA 23219

HuntonAK.com

From: Lundman, Robert (ENRD) [mailto:Robert.Lundman@usdoj.gov]
Sent: Thursday, November 01, 2018 3:06 PM
To: Thomas Cmar; Johnson, Harry M. Pete
Cc: Bulleit, Kristy; McHugh, Timothy L.
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi all: the Fifth Circuit's ruling granting EPA's motion to dismiss the petition as moot (5th Cir. No. 18-60619) means that the parties in the DC Circuit appeal have to file motions to govern future proceedings by November 19. I thought it made sense to at least explore whether we can agree on a joint motion. It's EPA's position that the Fifth Circuit's ruling controls the mootness issue on appeal in the DC Circuit. As to the other issue, EPA thinks it makes sense to continue to hold the appeal in abeyance pending Fifth Circuit action in 18-60079. If we all agree on this, I'm happy to draft a short joint motion and circulate it. If it would be helpful to discuss this, that sounds good as well. Tomorrow is bad for me, but early next week is pretty open. Thanks!

Bob

From: Thomas Cmar <tcmar@ [REDACTED]>
Sent: Wednesday, June 20, 2018 11:41 AM
To: Johnson, Harry M. Pete <pjohnson@ [REDACTED]>
Cc: Bulleit, Kristy <kbulleit@ [REDACTED]>; McHugh, Timothy L. <TMcHugh@ [REDACTED]>; Toth, Brian (ENRD) <BToth@ENRD.USDOJ.GOV>; Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Pete,

Thanks for your email on this. We are still pulling together a final version of the motion, but we do not intend to say anything about the impact of the Fifth Circuit decision beyond what I said in my original email below. I.e., that if the Fifth Circuit issues a decision on the merits of our Delay Rule claims, that would likely obviate the need for any further proceedings in the D.C. Circuit concerning those claims.

I've now heard from Bob that EPA will likely be filing a response to the motion, so at this point I think it's probably best for us to file and UWAG can decide whether it also wants to weigh in with the court. Based on your email, I plan to represent UWAG's position as, "UWAG takes no position and reserves the right to file a response after reviewing the motion." But please let me know if that's not an accurate representation.

We don't plan to file until later this afternoon, and I would be happy to talk before then if that would be helpful.

Best,

Thom

From: Johnson, Harry M. Pete <pjohnson@[REDACTED]>
Sent: Tuesday, June 19, 2018 11:10 AM
To: Thomas Cmar <tcmar@[REDACTED]>
Cc: Bulleit, Kristy <kbulleit@[REDACTED]> McHugh, Timothy L. <TMcHugh@[REDACTED]> brian.toth@usdoj.gov; robert.lundman@usdoj.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Thom,

UWAG has no objection to the concept of severing and holding in abeyance the issue regarding the district's court's denial of leave to amend and supplement. Can you clarify what you intend to say to the Court, if anything, about the impact of a 5th Circuit decision on the merits? That is, if the 5th Circuit upholds the jurisdiction of courts of appeals to rule on the merits of your claims about the postponement rule, do you intend at that point to return to the DC Circuit and argue otherwise?

In any event, as I say, we have no objection to severing and holding the issue in abeyance. I would, however, like to see the motion in advance before consenting, if that is feasible and agreeable. If not, you can represent that UWAG takes no position until it sees the motion.

Thanks,

Pete

Harry M. Johnson, III

Partner

pjohnson@ [REDACTED]
[REDACTED]

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HuntonAK.com

From: Thomas Cmar [mailto:tcmar@ [REDACTED]]
Sent: Monday, June 18, 2018 7:49 AM
To: Johnson, Harry M. Pete; Bulleit, Kristy; McHugh, Timothy L.
Subject: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Dear Counsel:

I am writing on behalf of Appellants in the above matter to confer concerning a procedural motion that we intend to make by this Wednesday, June 20.

We intend to request that the Court sever and hold in abeyance the issue in our appeal of the district court's denial of leave to amend and supplement our complaint to assert new claims challenging EPA's September 2017 rule delaying certain Effluent Limitation Guidelines compliance deadlines by two years (the "Delay Rule"). Our reason for seeking the abeyance is that, as you know, we are currently briefing the merits of the same claims in *Clean Water Action v. U.S. Environmental Protection Agency*, Case No. 18-60079 (5th Cir.).

We believe that holding our appeal of the jurisdiction issue in abeyance is appropriate pending the outcome of the Fifth Circuit proceeding is appropriate because, notwithstanding the district court's decision, the issue of whether district or appeals courts have original jurisdiction over the Delay Rule has not been finally resolved. For example, it is possible that the Fifth Circuit will, *sua sponte*, consider whether it has jurisdiction to review the Delay Rule and conclude that it does not, ruling instead that challenges to the Delay Rule must proceed in district courts. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction") (internal quotation marks and citation omitted). In addition, at least one other party is challenging the Delay Rule in district court; in that case, pending in the District of Arizona, there are pending motions concerning this same jurisdictional issue. *See Center for Biological Diversity v. Pruitt*, Case No. 4:18-cv-00050-TUC-JAS. However, if the Fifth Circuit issues a decision on the merits of Appellants' Delay Rule claims, that would likely obviate the need for any further proceedings in the D.C. Circuit concerning those claims.

Please note that we are seeking an abeyance of their appeal of the district court's holding on their Delay Rule claims only. We are also appealing the district court's holding that our claims challenging EPA's April 2017 administrative stay of the ELG rule are moot. We will request that the Court set a briefing schedule on that issue.

Could you let me know if UWAG will take a position on our motion to sever and hold in abeyance our appeal on the Delay Rule claims? The favor of your reply by Wednesday at 12:00 Eastern would be much appreciated.

Please feel free to give me a call on my cell if you would like to discuss this matter by phone.

Thanks,

Thom Cmar

Thomas Cmar

Earthjustice

1101 Lake Street, Suite 405B

Oak Park, IL 60301

 (cell)

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*please consider the environment before printing

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Center for Biological Diversity,

10 Plaintiff,

11 v.

12 E Scott Pruitt, et al.,

13 Defendants.
14

NO. CV-18-00050-TUC-JAS

**JUDGMENT OF DISMISSAL IN A
CIVIL CASE**

15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed
18 October 29, 2018, Plaintiff to take nothing, and the complaint and action are dismissed.

19 Brian D. Karth

20 District Court Executive/Clerk of Court

21 October 29, 2018

22 By s/ Becky Ruiz
23 Deputy Clerk
24
25
26
27
28

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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Center for Biological Diversity,

10 Plaintiff,

11 v.

12 Andrew Wheeler, in his official capacity as
13 Acting Administrator of the U.S.
14 Environmental Protection Agency,¹ and
U.S. Environmental Protection Agency,

15 Defendants,

16 and

17 Utility Water Act Group,

18 Intervenor-Defendants.
19

No. CV-18-00050-TUC-JAS

ORDER

20 Pending before the Court is Andrew Wheeler's and the U.S. Environmental
21 Protection Agency's (Federal Defendants) and the Utility Water Act Group's (UWAG)
22 motions to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of
23 Civil Procedure 12(b)(1). For the reasons stated below, the motions are granted.²

24 **I. STANDARD OF REVIEW**

25 Pursuant to Rule 12(b)(1), a party may move to dismiss an action for lack of

26 ¹ Pursuant to Fed. R. Civ. P. 25(d), Andrew Wheeler is automatically substituted in for E.
Scott Pruitt (the former Administrator of the EPA initially named in the Complaint) as the
current Acting Administrator of the EPA.

27 ² Because the briefing is adequate and oral argument will not help in resolving this
28 matter, oral argument is denied. *See Mahon v. Credit Bureau of Placer County, Inc.*, 171
F.3d 1197, 1200-1201 (9th Cir. 1999).

1 subject matter jurisdiction. *See* Federal Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1)
2 motion to dismiss may advance “facial attacks” or “factual attacks” on subject-matter
3 jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Here,
4 Defendants’ challenges to Plaintiff’s Complaint are facial attacks, whereby “the
5 challenger asserts that the allegations contained in a complaint are insufficient on their
6 face to invoke federal jurisdiction.” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir.
7 2004). “Whether subject matter jurisdiction exists therefore does not depend on
8 resolution of a factual dispute, but rather on the allegations in the complaint.” *Id.* In
9 reviewing a Rule 12(b)(1) motion to dismiss, a court will take all the allegations in the
10 complaint as true, drawing all reasonable inferences in favor of the nonmoving party. *Id.*

11 **II. BACKGROUND**

12 The objective of the Clean Water Act (CWA) is “to restore and maintain the
13 chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).
14 The CWA prohibits “the discharge of any pollutant by any person” except as in
15 compliance with the Act. § 1311(a). One authorized exception to this prohibition is the
16 National Pollutant Discharge Elimination System (NPDES), which is administered by the
17 Environmental Protection Agency (EPA) under § 1342 of the CWA. Under the NPDES,
18 the EPA may issue permits which authorize persons to discharge pollutants that may
19 wash down stream, “upon condition that such discharge will meet . . . all applicable
20 requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343.” §1342(a)(1).
21 “NPDES permits impose limitations on the discharge of pollutants, and establish related
22 monitoring and reporting requirements, in order to improve the cleanliness and safety of
23 the Nation’s waters.” *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 625, 199 L. Ed.
24 2d 501 (2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs.*, 528 U.S. 167,
25 174, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). Among the multiple limitations imposed
26 by NPDES permits are effluent limitations, which the Act defines as “any restriction
27 established by a State or the Administrator on quantities, rates, and concentrations of
28 chemical, physical, biological, and other constituents which are discharged from point

1 sources into” various waters. 33 U.S.C. 1362(11).

2 In 2015, the EPA promulgated a rule (2015 ELG Rule) which established new
3 limits and standards, along with their associated compliance deadlines, for various types
4 of wastestreams discharged by new and existing steam electric power plants; the EPA
5 determined these limits and standards appropriate based on the Best Available
6 Technology Economically Achievable (BAT). *See* 80 Fed. Reg. 67,838, 67,841 (Nov. 3,
7 2015). The Rule also imposed effluent limitations for “legacy wastewater”³ which took
8 effect immediately upon the Rule’s promulgation. *Id.* at 67,854-55. The 2015 ELG Rule
9 was subsequently challenged by various parties, and petitions for review were
10 consolidated in the Fifth Circuit. *See Southwestern Electric Power Co. v. EPA*, No. 15-
11 60821 (5th Cir. Dec. 8, 2015). In response, the EPA Administrator determined that it was
12 appropriate and in the public interest to reconsider the Rule; the EPA further found that,
13 under 5 U.S.C. § 705, justice required it to stay the compliance dates of the Rule that had
14 not yet passed, pending judicial review. 82 Fed. Reg. 19,005 (April 25, 2017) (“Indefinite
15 Stay”). After undertaking reconsideration, on September 12, 2017, the Administrator
16 issued a final rule (ELG Rule Amendment) which, amongst other things, postponed by
17 two years certain compliance deadlines set forth in the 2015 ELG Rule. *See Id.* at 43,494.
18 In so doing, the Administrator withdrew the Indefinite Stay *See Id.* at 43,496.

19 On January 30, 2018, Plaintiff filed its Complaint for Declaratory and Injunctive
20 Relief with this Court. Plaintiff brought its claims as an Endangered Species Act (ESA)
21 citizen suit, invoking jurisdiction under 28 U.S.C. § 1331 and 16 U.S.C. § 1540.
22 Complaint at 1-2. Through its Complaint, Plaintiff challenged the ELG Rule Amendment,
23 alleging violations of the ESA and the National Environmental Policy Act (NEPA). *Id.*
24 On April 3, 2018, Federal Defendants filed a Motion to Dismiss, arguing that this Court
25 lacks jurisdiction to review Plaintiff’s claims because “under the CWA’s judicial review
26 provisions, *all* challenges to effluent limitations – no matter their statutory basis – must

27
28 ³ In this context, the term “legacy wastewater” refers to certain wastewaters generated
after the Rule’s promulgation but before the compliance deadlines had arrived. *See* 80
Fed. Reg. 67,854-55.

1 be brought in the court of appeals.” *See* Motion to Dismiss at 1 (citing 33 U.S.C.
2 1369(b)(1)). Shortly thereafter, on April 6, 2018, Utility Water Act Group (UWAG) filed
3 a Motion to Intervene, as well as a Proposed Motion to Dismiss for Lack of Subject-
4 Matter Jurisdiction or, in the Alternative, for Transfer. *See* Dkt. 14, 15. This Court
5 granted UWAG’s Motion to Intervene on June 6, 2018, permitting UWAG to intervene in
6 this action as an Intervenor-Defendant. *See Id.* at 26. This case has since been fully-
7 briefed by all interested parties.

8 **III. DISCUSSION**

9 This Court lacks jurisdiction to review Plaintiff’s claim because it challenges an
10 EPA action that is directly and exclusively reviewable in the federal courts of appeals.
11 The Clean Water Act (CWA) enumerates seven categories of EPA actions that must be
12 challenged directly in the federal courts of appeals. 33 U.S.C. § 1369(b)(1); *see also Nat’l*
13 *Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 623, 626, 628 (2018). The sole category
14 relevant here, subparagraph (E), vests courts of appeals with exclusive jurisdiction to
15 review any EPA actions “in approving or promulgating any effluent limitation or other
16 limitation under section 1311, 1312, 1316, or 1345 [of the CWA].” § 1369(b)(1)(E); *Nat’l*
17 *Ass’n of Mfrs.*, 138 S. Ct. at 628. The CWA defines “effluent limitation” as “any
18 restriction established by a State or the Administrator on quantities, rates, and
19 concentrations of chemical, physical, biological, and other constituents which are
20 discharged from point sources into” various waters. §1362(11). Though not explicitly
21 defined by the CWA, under § 1369(b)(1)(E) an “other limitation” must be a limitation
22 related to the discharge of pollutants, such as “a non-numerical operational practice or an
23 equipment specification that, like an ‘effluent limitation,’ restricts the discharge of
24 pollutants, even though such a limitation would not fall within the precise statutory
25 definition of ‘effluent limitation.’” *Nat’l Ass’n of Mfrs.*, 138 S. Ct. at 628-29.

26 As a preliminary matter, the parties do not dispute that the 2015 ELG Rule (80
27 Fed. Reg. 67,838) promulgated effluent limitations within the meaning of §
28 1369(b)(1)(E). *See, e.g.,* Complaint ¶¶ 32-33. The 2015 ELG Rule revised the effluent

1 limitation guidelines for new and existing steam electric power plants that discharge
2 wastestreams containing toxic and other pollutants. 80 Fed. Reg. 67,841. Specifically, the
3 Rule established effluent limitations for six wastestreams⁴ based on the Best Available
4 Technology Economically Achievable (BAT),⁵ and stipulated compliance deadlines for
5 these limitations, the earliest of them being November 1, 2018. *Id.* at 67,841-42. The
6 Rule further established particularized effluent limitations for “legacy wastewater,”
7 which encompass wastewater that is generated after the Rule’s effective date, but before
8 the compliance deadlines come into effect. *Id.* at 67,854; *see also Clean Water Action v.*
9 *Pruitt*, No. 17-0817, 2018 U.S. Dist. Lexis 64852 (D.D.C. Apr. 18, 2018).⁶ Recognizing
10 that the 2015 ELG Rule promulgated these multiple effluent limitations, thereby falling
11 within the ambit of § 1369(b)(1), challengers of the Rule invoked jurisdiction under §
12 1369(b)(1) and properly filed their respective actions in federal courts of appeals; these
13 actions were ultimately consolidated before the Fifth Circuit. *See Id.* at *14-15.

14 Plaintiff here, however, contends that the 2017 ELG Rule Amendment falls
15 outside the ambit of § 1369(b)(1) because “it does not approve or promulgate any effluent
16 limitation or other limitation, and does not change or otherwise amend the effluent
17 limitations and guidelines,” Pls. Opp. at 2, but instead “relieves a restriction on regulated
18 entities” by delaying the compliance deadlines established by the 2015 Rule. *Id.* at 3. As

19
20 ⁴ The six wastestreams are: fly ash transport water, bottom ash transport water,
21 combustion residual leachate, flue gas desulfurization wastewater, flue gas mercury
22 control wastewater, and gasification wastewater. *See* 80 Fed. Reg. at 67,841-42.

23 ⁵ “BAT is based on technological availability, economic achievability, and other statutory
24 factors and is intended to reflect the highest performance in the industry.” *Id.* at 67,841.

25 ⁶ This Court considered Plaintiff’s argument against the applicability of the D.C. District
26 Court’s recent holding in *Clean Water Action*. Pls. Opp. at 10-11, n.2. Plaintiff is correct
27 in asserting that the court in *Clean Water Action* technically addressed a different legal
28 question – whether to grant a motion to amend the complaint – than the one before this
Court here – whether to grant a motion to dismiss for lack of subject matter jurisdiction.
However, this Court agrees with Federal Defendants’ argument that the D.C. court
nonetheless “performed the same inquiry – whether ‘plaintiffs’ proposed claims’
challenging the ELG Amendment Rule ‘are futile because this Court lacks jurisdiction to
review them’ under Section 1369(b)(1)(E).” Def. Rep. at 1, n. 2 (quoting *Clean Water
Action*, 2018 LEXIS 64852, at *5) (emphasis added). Accordingly, this Court considered
the jurisdictional analysis in *Clean Water Action* and found it to be both highly relevant
and persuasive authority; this Court agrees with the reasoning of the *Clean Water Action*
court in finding that only federal courts of appeals have jurisdiction over the dispute at
bar. *See Clean Water Action*, 2018 LEXIS 64852, at *13-20.

1 discussed below, this Court finds Plaintiff's arguments unconvincing as the Amendment
2 promulgates effluent limitations or other limitations such that jurisdiction rests solely
3 with the federal courts of appeals.

4 First, the Amendment promulgates "limitation[s] related to the discharge of
5 pollutants" for five wastestreams in the steam electric power plant industry. *Nat'l Ass'n of*
6 *Mfrs.*, 138 S. Ct. at 628. The 2015 ELG Rule established effluent limitations and
7 standards, with corresponding compliance deadlines, for six wastestreams. 80 Fed. Reg.
8 at 67,841-42. In April of 2017, the EPA indefinitely stayed compliance deadlines for five
9 of these wastestreams pending judicial review. 82 Fed. Reg. at 19,005-06. As a result of
10 this intervening Stay, when the EPA subsequently promulgated the 2017 ELG Rule
11 Amendment, "much of the ELG Rule was not in effect; rather, the Stay had *indefinitely*
12 postponed compliance for five wastestreams. Thus, under the status quo immediately
13 preceding the Amendment, five wastestreams were not at all subject to 'existing
14 restrictions' established by the ELG Rule. The Amendment, by withdrawing the
15 Indefinite Stay, limits effluents compared to the status quo ante." *Clean Water Action*,
16 2018 LEXIS 64852, at *16. The Amendment imposes the same limits and standards,
17 along with their associated compliance deadlines, as the ELG Rule for three wastestreams
18 (flue gas mercury control wastewater, fly ash transport water, and gasification
19 wastewater), and retains the same limits and standards while setting new compliance
20 deadlines for two wastestreams (bottom ash transport water and flue gas desulfurization
21 wastewater).⁸ See 82 Fed. Reg. at 43,494-96; 43,498-99; 43,500. Because the intervening
22 Stay changed the status quo ante, the Amendment thus establishes restrictions on the
23 discharge of pollutants for these five wastestreams "that were not in effect on the day
24 before the Amendment." See *Clean Water Action*, 2018 LEXIS 64852, at *17.

25 Second, the Amendment promulgates effluent limitations or other limitations by

26 ⁸ The 2015 ELG Rule further required that "steam electric power plants would comply
27 with the new, more stringent requirements no later than 2023, with plants expected to
28 implement new control technologies over a five-year compliance period of 2019-2023
according to their permit renewal schedule." 82 Fed. Reg. at 43,497. The Stay removed
this requirement, pending judicial review, *id.* at 19,005, and the ELG Rule Amendment
re-imposed it. *Id.* at 43,496-97.

1 substantively revising the 2015 ELG Rule. As stated above, the Amendment establishes
2 new earliest compliance deadlines for two wastestreams (bottom ash transport water and
3 flue gas desulfurization wastewater) and changes the limitations and standards that will
4 apply up until those new compliance dates. 82 Fed. Reg. at 43,496. Under the 2015 ELG
5 Rule, the earliest compliance deadlines for these two wastestreams were set as November
6 1, 2018; before that date arrived, the rule would impose “legacy wastewater” limits. 80
7 Fed. Reg. at 67,854. The Amendment revised the ELG Rule by changing the earliest
8 compliance deadlines for these wastestreams to November 1, 2020, and by extending the
9 imposition of “legacy wastewater” limits up until this new date. 82 Fed. Reg. at 43,500.
10 In short, the 2015 ELG Rule and the ELG Rule Amendment each impose distinct limits
11 and standards that would apply to these two wastestreams between November 1, 2018,
12 and November 1, 2020: under the ELG Rule, the new, more stringent limitations and
13 standards would apply during this period, whereas under the ELG Rule Amendment, the
14 “legacy wastewater” limits would continue to apply.⁹ By substantively revising the
15 relevant compliance deadlines and applicable standards set forth in the ELG Rule, the
16 ELG Rule Amendment thus approves or promulgates different limitations related to the
17 discharge of pollutants during this period.¹⁰

18 Plaintiff, perhaps unwittingly, acknowledged this in its notice of intent to sue, in
19 which it states: “By delaying implementation of vital portions of the 2015 ELGs for two
20 years, *thereby authorizing these pollutant discharges to continue*, the newly issued ELG

21 ⁹ The Court notes that the ELG Rule Amendment imposes substantive limitations during
22 this two-year period (“legacy wastewater” limitations), rather than providing “no
23 limitation whatsoever.” *See Nw. Env’tl. Advocates v. EPA*, 537 F.3d 1006, 1016 (9th Cir.
24 2008). The ELG Rule Amendment does not simply exempt these two wastestreams from
any limitations whatsoever; instead, it changes the relevant types of limitations and
standards which will apply to these wastestreams during this period. 82 Fed. Reg. at
43,496.

25 ¹⁰ In *Clean Water Action*, the D.C. District Court provides a fitting example
26 demonstrating the effect of such a change in a comparable scenario: “To illustrate,
27 consider a road with a speed limit of forty miles per hour. Changing the road’s speed limit
28 sets a new speed limit, and the analysis is no different if the change only affects future
compliance deadlines. If a rule (like the ELG Rule) sets twenty miles per hour as a new
speed limit that will apply on the road starting in late 2018, and a later rule (like ELG
Rule Amendment) revises the compliance deadline to 2020, the later rule sets a different
speed limit on that road for the period from late 2018 to 2020: forty miles per hour
instead of twenty miles per hour.” *Clean Water Action*, 2018 LEXIS 64852, at *18.

1 Delay Rule has caused the very adverse environmental impacts that warranted the 2015
2 ELGs...” Exhibit 1 at 2, incorporated into the Complaint at ¶ 4 (emphasis added).
3 Plaintiff later backpedaled to state that Federal Defendant EPA lacked “authority to
4 postpone or delay effluent limitations once they have been established, even for the
5 purposes of reconsideration.” Pls. Opp. at 13, citing 33 U.S.C. § 1311(b). Section 1311(d)
6 of the CWA requires that any “[r]eview and revision of effluent limitations” be
7 conducted “pursuant to the procedure established” in the statute. *Id.* at 1311(d). Plaintiff
8 argues that those procedures, including the multi-factor statutory analysis listed in §
9 1314(b)(2)(B) of the CWA, were not followed in issuing the ELG Rule Amendment. Pls.
10 Opp. at 14. Similar to the plaintiffs in *Clean Water Action*, Plaintiff here essentially
11 contends that the EPA failed to follow the “effluent limitation guidelines” when
12 promulgating the ELG Rule Amendment, while simultaneously asserting – for
13 jurisdictional purposes – that EPA did not promulgate or approve any “effluent limitation
14 or other limitation” when it published the ELG Rule Amendment. *See Clean Water*
15 *Action*, 2018 LEXIS 64852, at *19. Like the court in *Clean Water Action*, this Court finds
16 that the ELG Rule Amendment “approv[es] or promulgat[es] effluent limitation[s] or
17 other limitations[s].” 33 U.S.C. § 1369(b)(1)(E).¹¹

18 Third, the limitations prescribed by the ELG Rule Amendment were “approv[ed]
19 or promulgat[ed]... under section 1311, 1312, 1316, or 1345,” thereby meeting the
20 criteria set forth in § 1369(b)(1)(E). “With respect to subparagraph (E), the statutory
21 context makes clear that the prepositional phrase—‘under section 1311’—is most

22 ¹¹ The Court notes Plaintiff’s reliance on *Nat’l Ass’n of Mfrs.* in arguing that § 1369(b)(1)
23 is to be construed narrowly, “and explicitly encompasses only EPA actions approving or
24 promulgating effluent limitations or other limitations.” Pls. Opp. at 7, citing *Nat’l Ass’n of*
25 *Mfrs.*, 138 S. Ct. at 628-31. In *Nat’l Ass’n of Mfrs.*, the Court held that the Waters of the
26 United States Rule, which defined the geographic scope of “waters of the United States”
27 for purposes of the CWA, did not fall within the ambit of § 1369(b)(1)(E) because the
28 Rule merely “announces a regulatory definition for a statutory term, but “does not
establish any regulatory requirements” and “imposes no enforceable duty on any state,
local, or tribal governments, or the private sector.” *Id.* at 626, 628 (quoting 80 Fed. Reg.
37,054, 37,102). Conversely, the ELG Rule Amendment establishes multiple regulatory
requirements and enforceable duties, namely those limitations discussed above.
Recognizing that the ELG Rule Amendment “impose[s] restrictions on the discharge of
certain pollutants,” this Court concludes that the Amendment falls within the narrow
ambit of Section 1369(b)(1)(E). *Id.* at 629.

1 naturally read to mean that the effluent limitation or other limitation must be approved or
2 promulgated ‘pursuant to’ or ‘by reason of the authority of’ §1311.” *Nat’l Ass’n of Mfrs.*,
3 138 S. Ct. at 630. In advancing its argument that the Federal Defendants did not properly
4 adhere to the relevant revision procedures in promulgating the ELG Rule Amendment,
5 Pls. Opp. at 13-14, Plaintiff does not account for the critical portion of the Amendment
6 where the EPA expressly invokes its congressional authority under the CWA to revise
7 effluent limitations and standards, citing directly to 33 U.S.C. 1311(d) (which provides
8 for EPA review and revision of standards) and § 1314(b) (which provides the multi-factor
9 statutory analysis required for revising effluent limitations). 82 Fed. Reg. at 43,496.
10 Therefore, this Court holds that the ELG Rule Amendment promulgates effluent or other
11 limitations within the meaning of 1369(b)(1)(E), and thus may be challenged directly and
12 exclusively in the federal courts of appeals.

13 **CONCLUSION**

14 In light of the foregoing, IT IS HEREBY ORDERED as follows:

- 15 (1) The Federal Defendants’ and the UWAG’s motions to dismiss are granted.
16 (2) This case is dismissed.
17 (3) The Clerk of the Court shall enter judgment and close the file in this case.

18
19 Dated this 29th day of October, 2018.

20
21
22 

23 Honorable James A. Soto
24 United States District Judge
25
26
27
28

Message

From: Levine, MaryEllen [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F59EF87B9924425897C750435BAD5522-MLEVINE]
Sent: 6/20/2018 5:39:11 PM
To: Lundman, Robert (ENRD) [Robert.Lundman@usdoj.gov]; O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: Witt, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fbcc13f5878c4ef4b7b880de0221b9f9-RWITT]; Neumann, Jennifer Scheller (ENRD) [Jennifer.Neumann@usdoj.gov]
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

No word yet, [REDACTED]

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345

From: Lundman, Robert (ENRD) [mailto:Robert.Lundman@usdoj.gov]
Sent: Wednesday, June 20, 2018 1:26 PM
To: Levine, MaryEllen <levine.maryellen@epa.gov>; O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Cc: Witt, Richard <Witt.Richard@epa.gov>; Neumann, Jennifer Scheller (ENRD) <Jennifer.Neumann@usdoj.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

[REDACTED]

From: Levine, MaryEllen <levine.maryellen@epa.gov>
Sent: Wednesday, June 20, 2018 11:48 AM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: Witt, Richard <Witt.Richard@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

[REDACTED]

[REDACTED] Let's take J off the
e mails; she is on maternity leave. Richard's handling for us.

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North

(202) 564-1345

From: Lundman, Robert (ENRD) [<mailto:Robert.Lundman@usdoj.gov>]
Sent: Wednesday, June 20, 2018 11:33 AM
To: Levine, MaryEllen <levine.maryellen@epa.gov>; O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Cc: Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

[REDACTED]

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Cc: Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
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Water Law Office, Office of General Counsel
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Sent: Wednesday, June 20, 2018 9:44 AM
To: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Any final thoughts before I email plaintiffs? [REDACTED]

[REDACTED] Thanks!

Bob

From: O'Donnell, Jessica (ENRD)
Sent: Tuesday, June 19, 2018 5:14 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Thanks, Tsuki and Bob. [REDACTED]
notice.

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

From: Hoshijima, Tsuki (ENRD)
Sent: Tuesday, June 19, 2018 5:05 PM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

[REDACTED]

From: Lundman, Robert (ENRD)
Sent: Tuesday, June 19, 2018 5:02 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

[REDACTED]

Bob

From: Hoshijima, Tsuki (ENRD)
Sent: Tuesday, June 19, 2018 4:55 PM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
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[REDACTED]

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To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
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Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Bob,

Here is the Fifth Circuit briefing schedule:


July 12, 2018: Petitioners' Brief

September 17, 2018: Respondents' Brief

October 17, 2018: Intervenor UWAG's Brief

November 16, 2018: Petitioners' Reply Brief

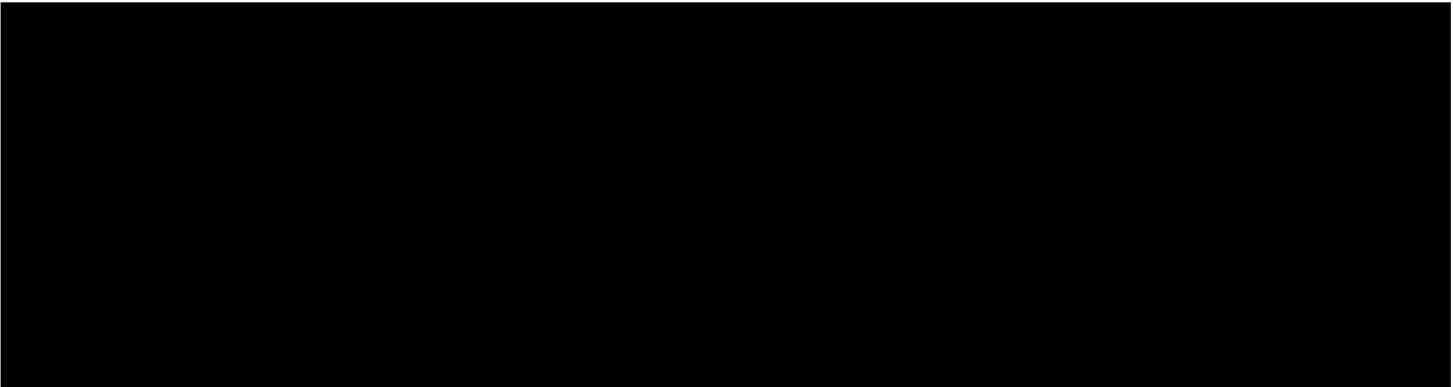
December 6, 2018: Joint Appendix



Tsuki

From: Lundman, Robert (ENRD)
Sent: Monday, June 18, 2018 2:43 PM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi all: thanks for your responses!



Thanks!

Bob

From: O'Donnell, Jessica (ENRD)
Sent: Monday, June 18, 2018 9:42 AM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: Re: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Bob -

I'm teleworking today. If you'd like to reach me, my cell is [REDACTED]

Jessica

Sent from my iPhone

On Jun 18, 2018, at 9:13 AM, Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV> wrote:

Hello again: I've added Mary Ellen and Richard to the email, as it appears Jessica Zomer is on leave. Thanks!


Bob


From: Lundman, Robert (ENRD)
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Subject: FW: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi all: As Jessica O. and Tsuki have heard, I am the ENRD appellate attorney assigned to this appeal. I look forward to working with all of you!



Bob

Robert J. Lundman
Environment and Natural Resources Division
U.S. Department of Justice
Phone 

From: Thomas Cmar <tcmar@
Sent: Monday, June 18, 2018 7:49 AM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; Toth, Brian (ENRD) <BToth@ENRD.USDOJ.GOV>
Subject: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Dear Counsel:

I see that you recently appeared on behalf of EPA in the above-captioned matter. I am writing on behalf of the Appellants to confer concerning a procedural motion that we intend to make by this Wednesday, June 20.

We intend to request that the Court sever and hold in abeyance the issue in our appeal of the district court's denial of leave to amend and supplement our complaint to assert new claims challenging EPA's September 2017 rule delaying certain Effluent Limitation Guidelines compliance deadlines by two years (the "Delay Rule"). Our reason for seeking the abeyance is that, as you likely know, we are currently briefing the merits of the same claims in *Clean Water Action v. U.S. Environmental Protection Agency*, Case No. 18-60079 (5th Cir.).

We believe that holding our appeal of the jurisdiction issue in abeyance is appropriate pending the outcome of the Fifth Circuit proceeding is appropriate because, notwithstanding the district court's decision, the issue of whether district or appeals courts have original jurisdiction over the Delay Rule has not been finally resolved. For example, it is possible that the Fifth Circuit will, *sua sponte*, consider whether it has jurisdiction to review the Delay Rule and conclude that it does not, ruling instead that challenges to the Delay Rule must proceed in district courts. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction") (internal quotation marks and citation omitted). In addition, at least one other party is challenging the Delay Rule in district court; in that case, pending in the District of Arizona, there are pending motions concerning this same jurisdictional issue. *See Center for Biological Diversity v. Pruitt*, Case No. 4:18-cv-00050-TUC-JAS. However, if the Fifth Circuit issues a decision on the merits of Appellants' Delay Rule claims, that would likely obviate the need for any further proceedings in the D.C. Circuit concerning those claims.

Please note that we are seeking an abeyance of their appeal of the district court's holding on their Delay Rule claims only. We are also appealing the district court's holding that our claims challenging EPA's April 2017 administrative stay of the ELG rule are moot. We will request that the Court set a briefing schedule on that issue.

Could you let me know if EPA will take a position on our motion to sever and hold in abeyance our appeal on the Delay Rule claims? The favor of your reply by Wednesday at 12:00 Eastern would be much appreciated.

Please feel free to give me a call on my cell if you would like to discuss this matter by phone.

Thanks,

Thom Cmar

Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301
[REDACTED]

The information contained in this email message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments.

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Message


From: Levine, MaryEllen [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F59EF87B9924425897C750435BAD5522-MLEVINE]
Sent: 6/20/2018 4:18:23 PM
To: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
CC: Lundman, Robert (ENRD) [Robert.Lundman@usdoj.gov]; Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]; Witt, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fbcc13f5878c4ef4b7b880de0221b9f9-RWITT]; Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Ok - 

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345

From: O'Donnell, Jessica (ENRD) [mailto:Jessica.O'Donnell@usdoj.gov]
Sent: Wednesday, June 20, 2018 12:17 PM
To: Levine, MaryEllen <levine.maryellen@epa.gov>
Cc: Lundman, Robert (ENRD) <Robert.Lundman@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>; Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: Re: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)



Sent from my iPhone

On Jun 20, 2018, at 12:11 PM, Levine, MaryEllen <levine.maryellen@epa.gov> wrote:



- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel

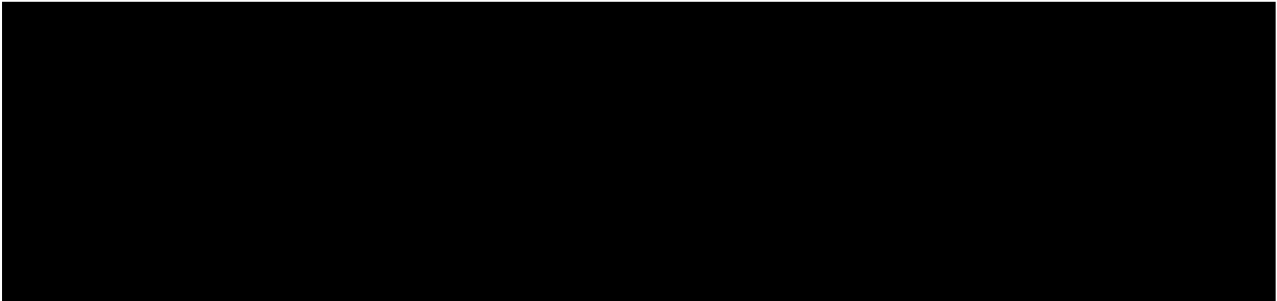
7510 C WJC North
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Sent: Tuesday, June 19, 2018 5:02 PM
To: Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>; O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
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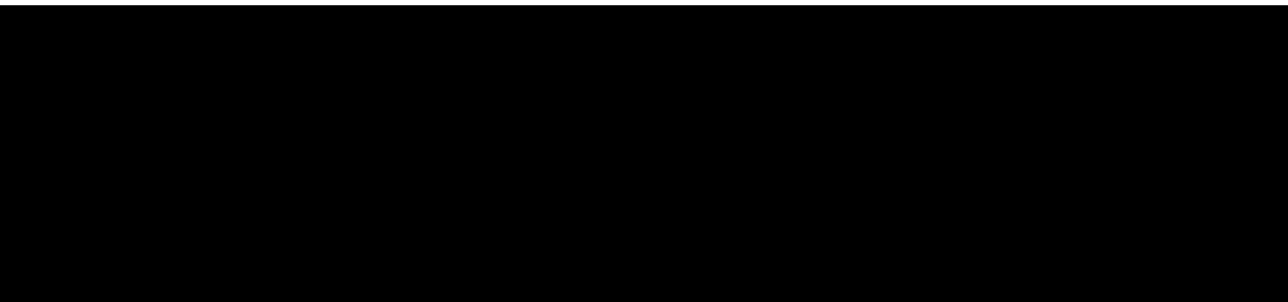


Bob

From: Hoshijima, Tsuki (ENRD)
Sent: Tuesday, June 19, 2018 4:55 PM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
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Tsuki

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Hi all: thanks for your responses!



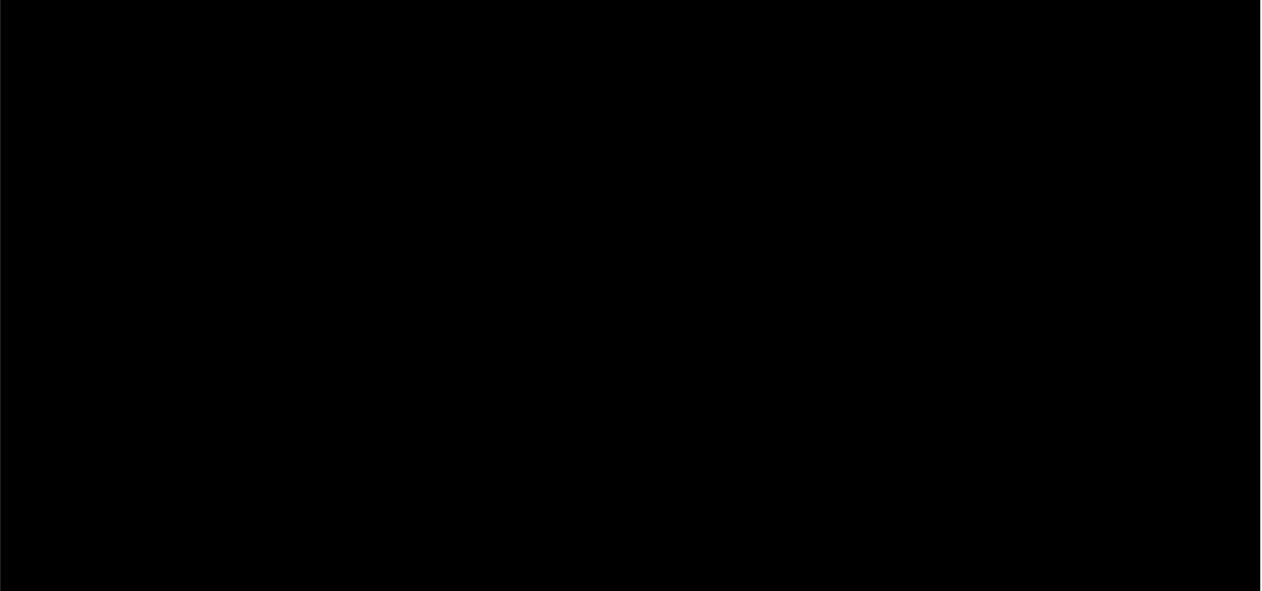
Thanks!


Bob

From: O'Donnell, Jessica (ENRD)
Sent: Monday, June 18, 2018 9:42 AM

To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: Re: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

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Sent from my iPhone

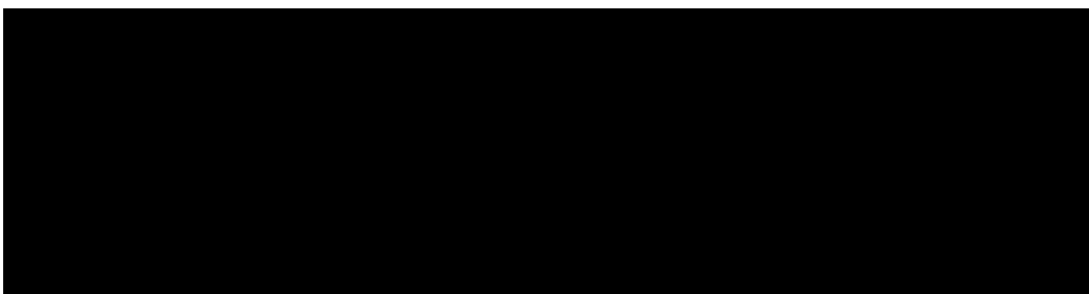
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Hi all: As Jessica O. and Tsuki have heard, I am the ENRD appellate attorney assigned to this appeal. I look forward to working with all of you!



[REDACTED]

as well. Thanks!

Bob

Robert J. Lundman
Environment and Natural Resources Division
U.S. Department of Justice
Phone: [REDACTED]

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Thanks,

Thom Cmar

Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301
[REDACTED]

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Message

From: Levine, MaryEllen [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F59EF87B9924425897C750435BAD5522-MLEVINE]
Sent: 11/30/2017 8:44:06 PM
To: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; kate.bowers@usdoj.gov [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=userd2122a94]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
CC: Neugeboren, Steven [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfd837ac503949a9820715b53ba921e6-SNEUGEBO]; Dierker, Carl [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d1f9b7627f8e4efab65f9e9513bf323e-Dierker, Carl]
Subject: RE: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

Thanks, this is helpful Jessica.

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345

From: O'Donnell, Jessica (ENRD) [mailto:Jessica.O'Donnell@usdoj.gov]
Sent: Thursday, November 30, 2017 3:05 PM
To: Levine, MaryEllen <levine.maryellen@epa.gov>; kate.bowers@usdoj.gov; McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Dierker, Carl <Dierker.Carl@epa.gov>
Subject: RE: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

Mary Ellen —

As far as I know, we have not initiated any shutdown planning yet, but I would expect to go through our normal procedures for filing extension motions and determining who needs to be excepted to work on cases that require attention, which would include an evaluation of filing deadlines for briefs. We'll of course coordinate with you about our needs; but, I assume whether anyone at EPA is excepted will be an EPA decision.

Thanks,
Jessica

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

From: Levine, MaryEllen [<mailto:levine.maryellen@epa.gov>]
Sent: Wednesday, November 29, 2017 3:36 PM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Bowers, Kate (ENRD) <KBowers@ENRD.USDOJ.GOV>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Dierker, Carl <Dierker.Carl@epa.gov>
Subject: FW: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

My DoJ Colleagues,

I am not sure that Jessica, Pete Ford (Erin or George) or I are on any lists should there be a shutdown. Steve just said

[REDACTED]

Not, I am a bit concerned.

[REDACTED]

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345

From: Levine, MaryEllen
Sent: Wednesday, November 29, 2017 3:33 PM
To: Flannery-Keith, Erin <Flannery-Keith.Erin@epa.gov>; Dierker, Carl <Dierker.Carl@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Utting, George <Utting.George@epa.gov>
Cc: Williams, Ann <Williams.Ann@epa.gov>; Williamson, Timothy <Williamson.Tim@epa.gov>
Subject: RE: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

When I mentioned this to Steve [REDACTED]
[REDACTED] I will raise again with him at my weekly.

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345

From: Flannery-Keith, Erin
Sent: Wednesday, November 29, 2017 2:18 PM
To: Dierker, Carl <Dierker.Carl@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Utting, George <Utting.George@epa.gov>

Cc: Williams, Ann <Williams.Ann@epa.gov>; Williamson, Timothy <Williamson.Tim@epa.gov>

Subject: RE: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT
COB Monday, November 27, 2017

Dear Carl,

Thanks for the heads up. I will check with my branch chief and division director to see if they have submitted a list of excepted people yet for OWM.

-Erin

From: Dierker, Carl

Sent: Wednesday, November 29, 2017 2:10 PM

To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Utting, George <Utting.George@epa.gov>; Flannery-Keith, Erin <Flannery-Keith.Erin@epa.gov>

Cc: Williams, Ann <Williams.Ann@epa.gov>; Williamson, Timothy <Williamson.Tim@epa.gov>

Subject: FW: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT
COB Monday, November 27, 2017

Hi Steve & Mary Ellen -- I expect WLO has already submitted your list for this exercise (apparently someone in R1 missed the request), [REDACTED]

[REDACTED]
whose list they should be on (OW's, OGC's or R1's). We've provided their names on our list, but that might not do them much good since they actually work at HQ.

Hi George & Erin -- Let us know if you've already gotten yourselves on the OW list; otherwise we'll need to make sure you get on one of the other lists.

Thanks,

Carl

Carl F. Dierker

Regional Counsel

U.S. EPA -- Region 1, New England

5 Post Office Square

Boston, Massachusetts 02109-3912

tel: 617-918-1091

e-mail: dierker.carl@epa.gov

From: Williamson, Timothy

Sent: Wednesday, November 29, 2017 12:00 PM

To: O'Brien, Patricia <Obrien.Pat@epa.gov>

Cc: Weeks, Frederick <Weeks.Fred@epa.gov>; Dierker, Carl <Dierker.Carl@epa.gov>; Chow, James <chow.james@epa.gov>; Hamjian, Lynne <Hamjian.Lynne@epa.gov>

Subject: RE: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT
COB Monday, November 27, 2017

Hi Pat and Fred,

ORC has some further recommended additions to the excepted list. These all stem from the

Ann Williams - ORA
Newt Tedder - OEP
Thelma Murphy – OEP

Also, two program attorneys who work in OW are staffing this case for ORC through the SMP:

Erin Flannery-Keith
George Utting

I don't know if we can put them on our list or if you need to work with OW to list them.

Thanks, Tim

From: Williamson, Timothy
Sent: Tuesday, November 28, 2017 11:42 AM
To: O'Brien, Patricia <Obrien.Pat@epa.gov>
Cc: Weeks, Frederick <Weeks.Fred@epa.gov>; Dierker, Carl <Dierker.Carl@epa.gov>
Subject: FW: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

Hi Pat,

ORC has two additions to the excepted list as follows:

[REDACTED]

Carl has asked that I be included in the shutdown list, but it looks like that issue has already been decided the last time we did this.

Best, Tim

From: Weeks, Frederick
Sent: Tuesday, November 28, 2017 11:25 AM
To: Barmakian, Nancy <Barmakian.Nancy@epa.gov>; Williamson, Timothy <Williamson.Tim@epa.gov>; Houlihan, Damien <houlahan.damien@epa.gov>; Hunter, Johanna <Hunter.Johanna@epa.gov>; Chow, James <chow.james@epa.gov>; Conway, Timothy <Conway.Tim@epa.gov>; Weeks, Frederick <Weeks.Fred@epa.gov>
Cc: Shanahan, Katherine <Shanahan.Katherine@epa.gov>; Haslett, Brenda <Haslett.Brenda@epa.gov>; Hamjian, Lynne <Hamjian.Lynne@epa.gov>; McGuire, Karen <Mcguire.Karen@epa.gov>; Leshen, Margaret

<Leshen.Margaret@epa.gov>

Subject: FW: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

Deputies,

Sorry we missed this request from HQ to update our shutdown list. Attached is a copy of the last list that we sent to HQ in April 2017. Please review and send your updates to Pat O'Brien by COB tomorrow.

Thanks,
Fred

From: Showman, John

Sent: Tuesday, November 28, 2017 10:42 AM

To: Kenyon, Michael <Kenyon.Michael@epa.gov>; Esher, Diana <Esher.Diana@epa.gov>; Manna, Richard <Manna.Richard@epa.gov>

Cc: Krakowiak, John <Krakowiak.John@epa.gov>; Weeks, Frederick <Weeks.Fred@epa.gov>; Pace, Donald <Pace.Donald@epa.gov>

Subject: FW: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

I don't recall getting your updated list? Can you send ASAP. Thanks.

From: Showman, John

Sent: Monday, November 13, 2017 1:42 PM

To: DAA-Career <DAACareer@epa.gov>; ARA <ARA@epa.gov>; Badalamente, Mark <badalamente.mark@epa.gov>; Radzikowski, Mary Ellen <Radzikowski.Maryellen@epa.gov>; Wooden-Aguilar, Helena <Wooden-Aguilar.Helena@epa.gov>; Allen, Reginald <Allen.Reginald@epa.gov>; Simon, Nigel <Simon.Nigel@epa.gov>

Cc: Vizian, Donna <Vizian.Donna@epa.gov>; Flynn, Mike <Flynn.Mike@epa.gov>; Darwin, Henry <darwin.henry@epa.gov>; Cheatham, Reggie <cheatham.reggie@epa.gov>; Hitchens, Lynnnann <hitchens.lynnann@epa.gov>; Terris, Carol <Terris.Carol@epa.gov>; DRA <DRA@epa.gov>

Subject: Contingency Planning - Request for updated list of excepted and shutdown personnel - Response due NLT COB Monday, November 27, 2017

As you know the government is currently funded thru Friday, December 8, 2017. Prudent management requires us to be prepared to implement our contingency plan for a shutdown should there be a lapse in funding. Therefore, I am asking all program and regional offices to review/update their list of shutdown and excepted personnel.

At the bottom of your list you should identify EPA personnel deployed for EPA direct response activities associated with the recent hurricanes and the California wildfires. You should exclude any EPA employee who is serving as a FEMA volunteer in support of the recent hurricanes.

Attached is EPA's Contingency Plan for a Shutdown and copies of the latest list I have for each organization. Please submit an updated list for your organization to me no later than COB Monday, November 27, 2017. Let me know if you have any questions. Thanks.

John L Showman III, Acting Principal Deputy Assistant Administrator

Office of Administration and Resources Management
US Environmental Protection Agency
202-564-5341

Appointment

From: Forsgren, Lee [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A055D7329D5B470FBAA9920CE1B68A7D-FORSGREN, D]
Sent: 4/6/2018 3:03:27 PM
To: Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; kevin.bromberg@sba.gov; Fotouhi, David [Fotouhi.David@epa.gov]; Nagle, Deborah [Nagle.Deborah@epa.gov]; Wood, Robert [Wood.Robert@epa.gov]; McDonough, Owen [mcdonough.owen@epa.gov]; Grevatt, Peter [Grevatt.Peter@epa.gov]
CC: Campbell, Ann [Campbell.Ann@epa.gov]; Matuszko, Jan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=94eefc2788084d73a97caf80d30a0e24-JMatuszk]; Burneson, Eric [Burneson.Eric@epa.gov]
Subject: FW: Meeting with Kevin Bromberg
Attachments: Real ID Information.pdf; Advocacy Petition for Review re EPA Steam Electric Power Plant Effluent Limitations Guidelines.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 3219B WJCe Please call 202-564-5700 for escort
Start: 4/9/2018 3:00:00 PM
End: 4/9/2018 3:45:00 PM
Show Time As: Busy

-----Original Appointment-----

From: Forsgren, Lee
Sent: Thursday, April 05, 2018 12:04 PM
To: Forsgren, Lee; kevin.bromberg@sba.gov; Fotouhi, David; Nagle, Deborah; Wood, Robert
Cc: Campbell, Ann
Subject: Meeting with Kevin Bromberg
When: Monday, April 09, 2018 11:00 AM-11:45 AM (UTC-05:00) Eastern Time (US & Canada).
Where: 1201 Constitution Ave NW, Washington DC 20004 3219B WJCe Please call 202-564-5700 for escort

Kevin Bromberg

Assistant Chief Counsel for Environmental Policy

SBA // Office of Advocacy

409 3rd St. SW, Washington, D.C. 20416

✉ kevin.bromberg@sba.gov 📞 202.481.2963

📠 202.205.6964

Charles Maresca | Director of Interagency Affairs | SBA Office of Advocacy |

409 3rd St. SW, Washington, DC 20416 | p 202/205-6978 | f 202/481-0408

Appointment

From: ODea, Elise [odea.elise@epa.gov]
Sent: 7/17/2018 8:04:15 PM
To: ODea, Elise [odea.elise@epa.gov]; OGC ALL USERS [OGC_ALL_USERS@epa.gov]; R1 ORC ALL [R1_ORC_ALL@epa.gov]; R10-ORC Mail Group [R10ORC_Mail_Group@epa.gov]; R2 ORC (Everyone) [R2_ORC_Everyone@epa.gov]; R3 ORC [R3_ORC@epa.gov]; R4 ORC Legal-Attorneys [R4_ORC_Legal-Attorneys@epa.gov]; R5 ORC ALL ATTORNEY [R5_ORC_ALL_ATTORNEY@epa.gov]; R5 ORC PARALEGAL [R5_ORC_PARALEGAL@epa.gov]; R6 6RC-ALL [R6_6RCALL@epa.gov]; R7 CNSL [R7_CNSL@epa.gov]; R8 ORC [R8_ORC@epa.gov]; R9-ORC [R9ORC@epa.gov]; Isales, Daniel [Isales.Daniel@epa.gov]; Mackay, Cheryl [Mackay.Cheryl@epa.gov]; Fenton, Terry [fenton.terry@epa.gov]; Keith, Jennie [Keith.Jennie@epa.gov]; Thompson, Heather [Thompson.Heather@epa.gov]; Kopf, Jeff [Kopf.Jeff@epa.gov]; Morafl, Kenneth [Morafl.Ken@epa.gov]; Calder, Steven [Calder.Steve@epa.gov]; Wells, Sharon [Wells.Sharon@epa.gov]; Perrin, Karla [perrin.karla@epa.gov]; Wilder, Scott [Wilder.Scott@epa.gov]; LaBlanc, Elizabeth [LaBlanc.Elizabeth@epa.gov]; Charney, Lauren [Charney.Lauren@epa.gov]; Doster, Brian [Doster.Brian@epa.gov]; Powell-Dickson, Antoinette [Powell-Dickson.Antoinette@epa.gov]; Rhodes, Julia [Rhodes.Julia@epa.gov]; Schroer, Lee [schroer.lee@epa.gov]; O'Donnell, Mary Jane [Odonnell.Maryjane@epa.gov]; Steiner-Riley, Cara [Steiner-Riley.Cara@epa.gov]; Matthews, Julie [Matthews.Juliane@epa.gov]; Havard, James [Havard.James@epa.gov]; Cherry, Randall [Cherry.Randall@epa.gov]; Conway, Timothy [Conway.Tim@epa.gov]; Smith, Candace [Smith.Candace@epa.gov]; Cardiello, Frank [Cardiello.Frank@epa.gov]; Fowley, Jeffry [Fowley.Jeff@epa.gov]; Studlien, Susan [Studlien.Susan@epa.gov]; Olivier, Tom [olivier.tom@epa.gov]; Vanni, Tammy [Vanni.Tammy@epa.gov]; Cooper, Geoff [Cooper.Geoff@epa.gov]; Utting, George [Utting.George@epa.gov]; Khoury, Lynn [Khoury.Lynn@epa.gov]; Shapiro, Naomi [Shapiro.Naomi@epa.gov]; Burke, Gerard [Burke.Gerard@epa.gov]; Guerrero, David [guerrero.david@epa.gov]; Adkins, Jocelyn [Adkins.Jocelyn@epa.gov]; Rollerson, Dinethea [Rollerson.Dinethea@epa.gov]; Roberts, Brad [roberts.brad@epa.gov]; Beitin, Clara [Beitin.Clara@epa.gov]; Kulschinsky, Edward [Kulschinsky.Edward@epa.gov]; Roose, Rebecca [Roose.Rebecca@epa.gov]; Weber, Courtney [Weber.Courtney@epa.gov]; Urdaz, Damaris [Urdaz.Damaris@epa.gov]; Yacovone, Krista [yacovone.krista@epa.gov]; Beveridge, Laura [Beveridge.Laura@epa.gov]; Whitcher, Elizabeth [Whitcher.Elizabeth@epa.gov]; VanItallie, Michael [vanItallie.Michael@epa.gov]; Williams, Ann [Williams.Ann@epa.gov]; Tonkin, Elissa [Tonkin.Elissa@epa.gov]; Kenyon, Peter [Kenyon.Peter@epa.gov]; Gallagher, Clare [gallagher.clare@epa.gov]; Joffe, Brian [Joffe.Brian@epa.gov]; Huskey, Angela [Huskey.Angela@epa.gov]; Barton, Kasey [Barton.Kasey@epa.gov]; Saporita, Chris [Saporita.Chris@epa.gov]; Boydston, Michael [Boydston.Michael@epa.gov]; Garnett, Desean [Garnett.Desean@epa.gov]; Kaczmarek, Chris [Kaczmarek.Chris@epa.gov]; Johnson, Johahna [Johnson.Johahna@epa.gov]; Catlin, Kelley [Catlin.Kelley@epa.gov]; Bigioni, Neil [bigioni.neil@epa.gov]; Wieder, Marla [Wieder.Marla@epa.gov]; BERMAN, TESSA [Berman.Tessa@epa.gov]; Chen, Alexander [Chen.Alex@epa.gov]; Wakefield, Benjamin J. [wakefield.benjamin@epa.gov]; Graham, Cheryl [Graham.Cheryl@epa.gov]; Versace, Paul [Versace.Paul@epa.gov]; Minshall, Chris [Minshall.Chris@epa.gov]; Skelley, Dana [Skelley.Dana@epa.gov]; Mills, Flaire [Mills.Flaire@epa.gov]; Lee, Sandra [lee.sandra@epa.gov]; Koch, Erin [Koch.Erin@epa.gov]; Ingemansen, Dean [Ingemansen.Dean@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Berry, Laura J. [Berry.Lauraj@epa.gov]; Mancusi-Ungaro, Philip [Mancusi-Ungaro.Philip@epa.gov]; Mastro, Donna [mastro.donna@epa.gov]; Ting, Kaytrue [Ting.Kaytrue@epa.gov]; Martinez, Hugh [martinez.hugh@epa.gov]; Nann, Barbara [nann.barbara@epa.gov]; Sadowsky, Don [Sadowsky.Don@epa.gov]; McConkey, Diane [Mcconkey.Diane@epa.gov]; Lukens, Elizabeth [Lukens.Elizabeth@epa.gov]; Walters, Julie [Walters.Julie@epa.gov]; Kirby-Miles, Leslie [kirby-miles.leslie@epa.gov]; Smith, Kevin B. [Smith.Kevin@epa.gov]; Gallo, Madeline [Gallo.Madeline@epa.gov]; Raut, Leena [Raut.Leena@epa.gov]; Clark, Jacqueline [clark.jacqueline@epa.gov]; Berman, Michael [berman.michael@epa.gov]; Curley, Michael [Curley.Michael@epa.gov]; Zaharoff, Josh [Zaharoff.Josh@epa.gov]; Peachey, Robert [peachey.robert@epa.gov]; Wetherington, Michele [Wetherington.Michele@epa.gov]; Fritz, Frank [Fritz.Frank@epa.gov]; Olszewski, Joshua [olszewski.joshua@epa.gov]; Gallagher, Shirin [Gallagher.Shirin@epa.gov]; Murdock, Russell [Murdock.Russell@epa.gov]; LaBoda, Sarah [LaBoda.Sarah@epa.gov]; Coral, Edgar [Coral.Edgear@epa.gov]; Triplett, Eric [Triplett.Eric@epa.gov]; Brown, Leah [Brown.Leah@epa.gov]; Talbot, Kristine [Talbot.Kristine@epa.gov]; Perdomo, Susan [perdomo.susan@epa.gov]; Jensen, LeAnn [Jensen.Leann@epa.gov]; Alkon, Margaret [Alkon.Margaret@epa.gov]; Smith, Kristi [Smith.Kristi@epa.gov]; Palermo, Mark [palermo.mark@epa.gov]; Nalven, Heidi [Nalven.Heidi@epa.gov]; Logan, Paul [Logan.Paul@epa.gov]; Dreyfus, Bethany [Dreyfus.Bethany@epa.gov]; Sutin, Elyana [Sutin.Elyana@epa.gov]; Connery, Shannon [Connery.Shannon@epa.gov]; Velez, Hector [Velez.Hector@epa.gov]; Dugan, Brett [Dugan.Brett@epa.gov]; Trudeau, Shaun [Trudeau.Shaun@epa.gov]; Lee, Michael [lee.michaelg@epa.gov]; Zomer, Jessica [Zomer.Jessica@epa.gov]; Vergeront, Julie [Vergeront.Julie@epa.gov]; Burgos, Lorena [Burgos.Lorena@epa.gov];

Peters, Milady [peters.milady@epa.gov]; Kermish, Laurie [Kermish.Laurie@epa.gov]; Hogan, Stephanie [Hogan.Stephanie@epa.gov]; Branning, Amy [Branning.Amy@epa.gov]; Withey, Charlotte [Withey.Charlotte@epa.gov]; Leefers, Kristin [Leefers.Kristin@epa.gov]; Skinner-Thompson, Jonathan [Skinner-Thompson.Jonathan@epa.gov]; Averback, Jonathan [Averback.Jonathan@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Zhang, Xiao [Zhang.Xiao@epa.gov]; Lyons, Ann (Separated 1/20/17) [Lyons.Ann@epa.gov]; Root, Kathleen [Root.Kathleen@epa.gov]; Bartlett, Deane [Bartlett.Deane@epa.gov]; Salisbury, Demetra [Salisbury.Demetra@epa.gov]; Palomaki, Ashley [Palomaki.Ashley@epa.gov]; Lueders, Jesse [Lueders.Jesse@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; Thrift, Mike [thrift.mike@epa.gov]; Herrema, Jeffrey [Herrema.Jeffrey@epa.gov]; Hammitt, Jennifer [Hammitt.Jennifer@epa.gov]; Koller, Mark [koller.mark@epa.gov]; Zabel, Allan [Zabel.Allan@epa.gov]; Mills, Derek [Mills.Derek@epa.gov]; Nelson, Leverett [nelson.leverett@epa.gov]; Grubb, Christopher [Grubb.Christopher@epa.gov]; Muehlberger, Christopher [muehlberger.christopher@epa.gov]; Jordan, Scott [Jordan.Scott@epa.gov]; Mairs, Stephanie [Mairs.Stephanie@epa.gov]; Askew, Wendel [Askew.Wendel@epa.gov]; Dubey, Susmita [dubey.susmita@epa.gov]; Mintzer, Michael [Mintzer.Michael@epa.gov]; Stoltzfus, Robert [Stoltzfus.Robert@epa.gov]; Dalton, Deborah [Dalton.Deborah@epa.gov]; Berol, David [Berol.David@epa.gov]; Rongone, Marie [Rongone.Marie@epa.gov]; Haskins, Antonio [Haskins.Antonio@epa.gov]; Kloeckner, Jane [Kloeckner.Jane@epa.gov]; Schilling, Leonard [Schilling.Leonard@epa.gov]; Hoang, Anhtu [Hoang.Anhtu@epa.gov]; Knorr, Michele [Knorr.Michele@epa.gov]; Brisendine, Collette [Brisendine.Collette@epa.gov]; Knapp, Michael [Knapp.Michael@epa.gov]; Edgell, Joe [Edgell.Joe@epa.gov]; Bangser, Paul [bangser.paul@epa.gov]; Grant, Brian [Grant.Brian@epa.gov]; Boyd, Andrew [Boyd.Andrew@epa.gov]; Rountree, Jillian [Rountree.Jillian@epa.gov]; Vetter, Rick [Vetter.Rick@epa.gov]; Hartman, Bob [Hartman.Bob@epa.gov]; Rodriguez, Socorro [Rodriguez.Socorro@epa.gov]; Murdock, James [Murdock.James@epa.gov]; Travis, Pamela [Travis.Pamela@epa.gov]; Howard, Carl [Howard.Carl@epa.gov]; Borromeo, Karina [Borromeo.Karina@epa.gov]; Williamson, Timothy [Williamson.Tim@epa.gov]; Fort, Daniel [Fort.Daniel@epa.gov]; Marshall, Tom [marshall.tom@epa.gov]; Hong, Jeanhee [Hong.Jeanhee@epa.gov]; Tunstill-Gale, Marion [tunstill-gale.marion@epa.gov]; Robinson, Dorothy [robinson.dorothy@epa.gov]; Hykel, Judith [Hykel.Judith@epa.gov]; Dangelo, AJ [Dangelo.Aj@epa.gov]; Kinghorn, Cash [Kinghorn.Cash@epa.gov]; Klassman, Debra [klassman.debra@epa.gov]; Weisinger, Keith [Weisinger.Keith@epa.gov]; Drummond, Greer [drummond.greer@epa.gov]; Thurmon, Clarke [Thurmon.Clarke@epa.gov]; Clarke, Victoria [clarke.victoria@epa.gov]; Rementer, Nicole [remitter.nicole@epa.gov]; Lupton, Jane [lupton.jane@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Lewis, Cynthia [lewis.cindy@epa.gov]; McGuire, Karen [Mcguire.Karen@epa.gov]; EPA ADR Specialists [EPA_ADR_Specialists@epa.gov]; Castelli, Matthew [castelli.matthew@epa.gov]; Al-Mudallal, Amer [Al-Mudallal.Amer@epa.gov]; Castelli, Kayleen [castelli.kayleen@epa.gov]; Braverman, Carole [braverman.carole@epa.gov]; Levin, Ronnie [Levin.Ronnie@epa.gov]; R5 ORC EPA [R5_ORC_EPA@epa.gov]; R5 ORC NON-EPA [R5_ORC_NONEPA@epa.gov]; O'Neill, Maureen [oneill.maureene@epa.gov]; Price, Aaron [price.aaron@epa.gov]; Paar, Jack [Paar.Jack@epa.gov]; Payne, James [payne.james@epa.gov]; Morgan, Jeanette [Morgan.Jeanette@epa.gov]; Saldenha, Jasmine [Saldenha.Jasmine@epa.gov]; Coe, Mary [Coe.Mary@epa.gov]; Stein, Jonathan [Stein.Jonathan@epa.gov]; Nunn, Shirlita [Nunn.Shirlita@epa.gov]; Bove, James [Bove.James@epa.gov]; Keeler, Katsumi [Keeler.Katsumi@epa.gov]; Tanner, Lee [Tanner.Lee@epa.gov]; O'Reilly, Maureen [O'Reilly.Maureen@epa.gov]; Ghosh, Mita [Ghosh.Mita@epa.gov]; Valdes, Mary [valdes.mary@epa.gov]; VonVacano, Marcela [VonVacano.Marcela@epa.gov]; Liem, Lucille [Liem.Lucille@epa.gov]; Wilber, Eric [Wilber.Eric@epa.gov]; Farrell, Ericka [Farrell.Ericka@epa.gov]; Rich, Stephanie [Rich.Stephanie@epa.gov]; Haire, Stacey [Haire.Stacey@epa.gov]; Talbert-Duarte, Angelia [talbert-duarte.angelia@epa.gov]; Spellman, Julie [spellman.julie@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]; Nast, Jeffrey [Nast.Jeffrey@epa.gov]; Rouch, Ellen [Rouch.Ellen@epa.gov]; Parikh, Pooja [Parikh.Pooja@epa.gov]; Vidargas, Nick [Vidargas.Nick@epa.gov]; Nazar, Kristen [Nazar.Kristen@epa.gov]; Lewis, Jennifer [Lewis.Jennifer@epa.gov]; Krueger, Thomas [krueger.thomas@epa.gov]; Sheppard, Tracy [Sheppard.Tracy@epa.gov]; Ajl, Diane [Ajl.Diane@epa.gov]; Denawa, Mai [Denawa.Mai@epa.gov]; Stopper, Nathan [stopper.nathan@epa.gov]; Bushey, Douglas [bushey.douglas@epa.gov]; Maher, Lauren [Maher.Lauren@epa.gov]; Stern, Allyn [Stern.Alyn@epa.gov]; Gonzalez, Maria [gonzalez.maria@epa.gov]; Cobb, Wilda [Cobb.Wilda@epa.gov]; Cerasani, Gina [Cerasani.Gina@epa.gov]; Fairbanks, Brianna [fairbanks.brianna@epa.gov]; Downs, Caitlin [Downs.Caitlin@epa.gov]; Ellis, Lisa [Ellis.Lisa@epa.gov]; Holwerda, Sharon [Holwerda.Sharon@epa.gov]; Goerke, Ariadne [Goerke.Ariadne@epa.gov]; Parker, Cynthia [Parker.Cynthia@epa.gov]; Tyner, Lee [tyner.lee@epa.gov]; Fugh, Justina [Fugh.Justina@epa.gov]; Mednick, Richard [Mednick.Richard@epa.gov]; Smith, Judy [Smith.Judy@epa.gov]; Roberts, Elisa [Roberts.Elisa@epa.gov]; Howland, Charles [Howland.Charles@epa.gov]; Green, Noelle [Green.Noelle@epa.gov]; Brown, Kendra [Brown.Kendra@epa.gov]; Long, Larry [Long.Larry@epa.gov]; Dixon, Lorraine [Dixon.Lorraine@epa.gov]; Lastra, David [Lastra.David@epa.gov]; Gable, Kelly [Gable.Kelly@epa.gov]; Meighan, Alexandra [Meighan.Alexandra@epa.gov]; Katz, Natalie [Katz.Natalie@epa.gov]; Cobb, Brandon [cobb.brandon@epa.gov]; Kasat, Rakhi [Kasat.Rakhi@epa.gov]; Beswick, Kevin

[Beswick.Kevin@epa.gov]; Beasley, Craig [Beasley.Craig@epa.gov]; Lee, Eugene [Lee.Eugene@epa.gov]; Zander, Rachel [Zander.Rachel@epa.gov]; Murphy, Kara [Murphy.Kara@epa.gov]; Collins, Jim [Collins.Jim@epa.gov]; Albores, Richard [Albores.Richard@epa.gov]; Wills, Jennifer [Wills.Jennifer@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Gallegos, Jacob [Gallegos.Jacob@epa.gov]; Rutland, Jade [Rutland.Jade@epa.gov]; Smith, Suzanne [Smith.Suzanne@epa.gov]; Matsumoto, Kimi [Matsumoto.Kimi@epa.gov]; Lazos, Pamela [Lazos.Pamela@epa.gov]; Pletan, Elizabeth [Pletan.Elizabeth@epa.gov]; Witt, Richard [Witt.Richard@epa.gov]; Dixit, Naeha [dixit.naeha@epa.gov]; Newton, Mimi [Newton.Mimi@epa.gov]; Koslow, Karin [Koslow.Karin@epa.gov]; Helmlinger, Andrew [Helmlinger.Andrew@epa.gov]; Burt, Sally [Burt.Sally@epa.gov]; Franco, Elena [franco.elena@epa.gov]; Bardo, John [bardo.john@epa.gov]; Clarizio, Richard [Clarizio.Richard@epa.gov]; Walker, Denise [Walker.Denise@epa.gov]; Simon, Paul [Simon.Paul@epa.gov]; Hoppe, Allison [hoppe.allison@epa.gov]; Stevens, Jim [Stevens.Jim@epa.gov]; Fisher, Bethany [fisher.bethany@epa.gov]; Berg, ElizabethG [Berg.ElizabethG@epa.gov]; Biffl, Betsy [Biffl.Betsy@epa.gov]; Sheesley, John [Sheesley.John@epa.gov]; Toney, Marcy [tony.marcy@epa.gov]; Michaud, John [Michaud.John@epa.gov]; Bickmore, Ryan [bickmore.ryan@epa.gov]; Holbus, Eric [holbus.eric@epa.gov]; Johnson, SusanA [Johnson.SusanA@epa.gov]; Tierney, Jan [tierney.jan@epa.gov]; Ebright, Stephanie [EBRIGHT.STEPHANIE@EPA.GOV]; Goldberg, Karen [Goldberg.Karen@epa.gov]; Scott, Susan [Scott.Susan@epa.gov]; Reitz, Katherine [reitz.katherine@epa.gov]; Sainsbury, Walter [sainsbury.walter@epa.gov]; Kyte, Larry [kyte.larry@epa.gov]; Abramson, Jennifer [Abramson.Jennifer@epa.gov]; Busterud, Gretchen [Busterud.Gretchen@epa.gov]; DeCambre, Peter [decambre.peter@epa.gov]; Kaminer, Joan [Kaminer.Joan@epa.gov]; Davies, Lynne [Davies.Lynne@epa.gov]; Leshak, Andrea [leshak.andrea@epa.gov]; Johnson, Patrick [johnson.patrick@epa.gov]; Stilp, Mark [Stilp.Mark@epa.gov]; Gsell, Alyssa [Gsell.Alyssa@epa.gov]; WILKINS, AZUREDE [wilkins.azurede@epa.gov]; Eiseman, Robin [Eiseman.Robin@epa.gov]; Monson, Mahri [Monson.Mahri@epa.gov]; Weiler, Eaton [weiler.eaton@epa.gov]; Carter, Courtney [carter.courtney@epa.gov]; Minor, Dustin [Minor.Dustin@epa.gov]; Briskin, Jeanne [Briskin.Jeanne@epa.gov]; Magnuson, Janet [Magnuson.Janet@epa.gov]; Glazer, Thomas [glazer.thomas@epa.gov]; Wells, Kimberly [wells.kimberly@epa.gov]; Harris, Bilal [Harris.Bilal@epa.gov]; Krallman, John [krallman.john@epa.gov]; Peaceman, Karen [peaceman.karen@epa.gov]; DeRobertis, Cecilia [DeRobertis.Cecilia@epa.gov]; Li, Ryland (Shengzhi) [Li.Ryland@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Berninger, Stephen [Berninger.Stephen@epa.gov]; Dubois, Roland [Dubois.Roland@epa.gov]; Reynolds, Rebekah [Reynolds.Rebekah@epa.gov]; Dreyzin, Gary [dreyzin.gary@epa.gov]; Finch, Rhelyn [Finch.Rhelyn@epa.gov]; Glynn, Nathaniel [glynn.nathaniel@epa.gov]; Pessetto, Jared [Pessetto.Jared@epa.gov]; Gonzales, Kristina [Gonzales.Kristina@epa.gov]; Meinhardt, Danielle [meinhardt.danielle@epa.gov]; Anderson, Monique [anderson.monique@epa.gov]; Harrison, Brenda [Harrison.Brenda@epa.gov]; Hoefer, David [Hoefer.David@epa.gov]; Barfield, Connie [Barfield.Connie@epa.gov]; Darman, Leslie [Darman.Leslie@epa.gov]; Barra, Michael [barra.michael@epa.gov]; Wojewodzki, Maureen [Wojewodzki.Maureen@epa.gov]; Yackulic, Ted [yackulic.ted@epa.gov]; Szalay, Endre [Szalay.Endre@epa.gov]; DeLuca, Kathryn [deluca.kathryn@epa.gov]; Mills, Clarissa [mills.clarissa@epa.gov]; Myers, Lucretia [MYERS.LUCRETIA@EPA.GOV]; Weekley, Erin [weekley.erin@epa.gov]; Peterson, Kate [peterson.kate@epa.gov]; Hodge, Erin [hodge.erin@epa.gov]; Cope, Clayton [cope.clayton@epa.gov]; Gardner, Allison [Gardner.Allison@epa.gov]; Przyborski, Jay [Przyborski.Jay@epa.gov]; Reilly, WilliamJ [Reilly.WilliamJ@epa.gov]; Lakhani, Puja [lakhani.puja@epa.gov]; Cole, Austin [cole.austin@epa.gov]; Haynie, Adam [haynie.adam@epa.gov]; Bermes, Peter [Bermes.Peter@epa.gov]; McDaniel, Perry [McDaniel.Perry@epa.gov]; Matson, John [matson.john@epa.gov]; DOnofrio, Cris [DOnofrio.Cris@epa.gov]; Rosoff, David [Rosoff.David@epa.gov]; Duda, Damian [Duda.Damian@epa.gov]; Tames, Pam [Tames.Pam@epa.gov]; Graham, Don [Graham.Don@epa.gov]; Tsiamis, Christos [Tsiamis.Christos@epa.gov]; Granger, Mark [Granger.Mark@epa.gov]; Christopher Saporita [chrissaporita@]; Glenn, Keith [Glenn.Keith@epa.gov]; Burgos, Hilda [Burgos.Hilda@epa.gov]; McKenna, Elizabeth [Mckenna.Elizabeth@epa.gov]; Estes, Sherry [estes.sherry@epa.gov]; Nieves-Munoz, Waleska [Nieves-Munoz.Waleska@epa.gov]; Covington, Jeryl [Covington.Jeryl@epa.gov]; Moncrieffe, Marcia [Moncrieffe.Marcia@epa.gov]; McDonald, Scott [mcdonald.scott@epa.gov]; Cole, Christopher [Cole.Christopher@epa.gov]; Schmeltzer, Hope [Schmeltzer.Hope@epa.gov]; Alvarado, Tina [Alvarado.Tina@epa.gov]; Byrne, Jennifer [Byrne.Jennifer@epa.gov]; Lindo, Talitha [lindo.talitha@epa.gov]; Hogan, Joanne [Hogan.Joanne@epa.gov]; Mann, Teresa [Mann.Teresa@epa.gov]; Martinez, Brittany [Martinez.Brittany@epa.gov]; Duross, Jeanne [Duross.Jeanne@epa.gov]; Hall, Katherin [hall.katherin@epa.gov]; Jefferson, Tricia [Jefferson.Tricia@epa.gov]; Pilchen, Zach [Pilchen.Zach@epa.gov]; Wulffen, Rebecca [Wulffen.Rebecca@epa.gov]; Kilborn, John [Kilborn.John@epa.gov]; Fidis, Alexander [Fidis.Alexander@epa.gov]; Wright, Garth [wright.garth@epa.gov]; Stillman, Sarah [Stillman.Sarah@epa.gov]; Melendez-Colon, Suzette [melendez-colon.suzette@epa.gov]; Lodin, Marianne [Lodin.Marianne@epa.gov]; Smith, Stephen [Smith.Stephen@epa.gov]; Pratt, Marirose [Pratt.Marirose@epa.gov]; Allen, Robin [Allen.Robin@epa.gov]; Puchalski, Connie [puchalski.connie@epa.gov]; Seidenstein, Roy [Seidenstein.Roy@epa.gov]; Nguyen, DucH [Nguyen.DucH@epa.gov]; Moore, John (Matthew)

[moore.johnm@epa.gov]; Lemley, Jamie [Lemley.Jamie@epa.gov]; Lonergan, Ralph [Lonergan.Ralph@epa.gov]; Sawyer, Bonnie [Sawyer.Bonnie@epa.gov]; Frizzell, Gretchen [Frizzell.Gretchen@epa.gov]; Tucker, Marlene [Tucker.Marlene@epa.gov]; Drouyor, Jason [drouyor.jason@epa.gov]; Li, Zizi [li.zizi@epa.gov]; Provano, Claire [provano.claire@epa.gov]; Sayre, Arthur [sayre.arthur@epa.gov]; Ross, Margaret [Ross.Margaret@epa.gov]; Hodges, Carson [Hodges.Carson@epa.gov]; Carpien, Alan [Carpien.Alan@epa.gov]; Lee, Khisa [Lee.Khisa@epa.gov]; Mitchell, Stacey [Mitchell.Stacey@epa.gov]; Halpern, Simon [Halpern.Simon@epa.gov]; Sublett, Stacey [Sublett.Stacey@epa.gov]; Franklin, Jamia [franklin.jamia@epa.gov]; Williams, LaShawn [williams.lashawn@epa.gov]; Foot, Christine [Foot.Christine@epa.gov]; Castanon, Lisa [Castanon.Lisa@epa.gov]; Cole, Kelly [Cole.Kelly@epa.gov]; Mills, Joann [Mills.Joann@epa.gov]; Rivera-Ocasio, Evelyn [Rivera-Ocasio.Evelyn@epa.gov]; Wagner, Amelia [Wagner.Amelia@epa.gov]; Tripathi, Arati [Tripathi.Arati@epa.gov]; Joe Edgell [joe@]; Weaver, Kerryann [weaver.kerryann@epa.gov]; Westergaard, Sara [westergaard.sara@epa.gov]; Williams II, Joseph [williamsii.joseph@epa.gov]; Dillard, Jacqueline [dillard.jacqueline@epa.gov]; Robinson, Martha [robinson.marta@epa.gov]; Mohanty, Jini [Mohanty.Jini@epa.gov]; Griffo, Shannon [Griffo.Shannon@epa.gov]; Hick, Patricia [Hick.Patricia@epa.gov]
CC: Greenglass, Nora [Greenglass.Nora@epa.gov]; Baptist, Erik [baptist.erik@epa.gov]; Hardee, Alex (Separated 10/27/17) [hardee.alex@epa.gov]; Kenney, Thomas [kenney.thomas@epa.gov]; Cantello, Nicole [cantello.nicole@epa.gov]; Berns, Anne [Berns.Anne@epa.gov]; Bending, Padmavati [bending.padmavati@epa.gov]; Good, Sheryl [Good.Sheryl@epa.gov]; Barnett, Cheryl [Barnett.Cheryl@epa.gov]; Buchsbaum, Seth [buchsbaum.seth@epa.gov]; Howell, Joyce [Howell.Joyce@epa.gov]; Stephenson, Natalie [stephenson.natalie@epa.gov]; Samples, Aisha [samples.aisha@epa.gov]; Mikalian, Charles [mikalian.charles@epa.gov]; Wilcox, Geoffrey [wilcox.geoffrey@epa.gov]; Johnson, MaryC [Johnson.MaryC@epa.gov]; Dudding, Chris [Dudding.Chris@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Nowell, Valerie [Nowell.Valerie@epa.gov]; Wood, Robert [Wood.Robert@epa.gov]; Matuszko, Jan [Matuszko.Jan@epa.gov]; Jordan, Ronald [Jordan.Ronald@epa.gov]; Benware, Richard [Benware.Richard@epa.gov]; Ramach, Sean [Ramach.Sean@epa.gov]; Beese, Jennifer [beese.jennifer@epa.gov]; Oviedo, Luis [oviedo.luis@epa.gov]; Yeany, Philip [Yeany.Philip@epa.gov]; Ihlenburg, Erick [Ihlenburg.Erick@epa.gov]; Temple, Kurt [Temple.Kurt@epa.gov]; Simpson, Terry [Simpson.Terry@epa.gov]; Campbell, Rich [Campbell.Rich@epa.gov]; Dain, Gregory [Dain.Greg@epa.gov]; Eckhardt, Cayleigh [eckhardt.cayleigh@epa.gov]; Siegal, Tod [Siegal.Tod@epa.gov]; Okoye, Winifred [Okoye.Winifred@epa.gov]; Trawick, Matthew [Trawick.Matthew@epa.gov]; Schwartz, Paul [Schwartz.Paul@epa.gov]; Nichols, Nathanael [nichols.nathanael@epa.gov]; Stein, Mark [Stein.Mark@epa.gov]; Garrett, Shellita [Garrett.Shellita@epa.gov]; Dolph, Becky [Dolph.Becky@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Wolfson, Steve [Wolfson.Steve@epa.gov]; Christenson, Kara [Christenson.Kara@epa.gov]; Kawakami, Cynthia [kawakami.cynthia@epa.gov]

Subject: OGC Brown Bag - Litigation During Regulatory Change: The Clean Water Act, Administrative Procedure Act, and Steam Electric Rule

Attachments: OGC Brown Bag - Litigation During Regulatory Change.pptx

Location: DCRoomWJCN 4045; Conf. line (866) 299-3188, code [REDACTED]

Start: 11/9/2017 5:00:00 PM

End: 11/9/2017 6:00:00 PM

Show Time As: Busy

Recurrence: (none)

Please join OGC's Water Law Office for a discussion of litigation involving EPA's decision to delay and reconsider the 2015 steam electric rule.

Adobe Connect link to view PowerPoint: <http://epawebconferencing.acms.com/brownbagogc/>

Message

From: Matuszko, Jan [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=94EEFC2788084D73A97CAF80D30A0E24-JMATUSZK]
Sent: 7/30/2018 1:23:44 PM
To: jan.mat@[REDACTED]
Subject: Fw: Some changes on the powerpoint
Attachments: 2018_8_02 Steam Electric ELG Briefing for Dave Ross.pptx rtw.pptx

From: Witt, Richard
Sent: Thursday, July 26, 2018 4:28 PM
To: Benware, Richard; Matuszko, Jan; Jordan, Ronald
Subject: Some changes on the powerpoint

I ended up just putting changes right on the slides. I tried to make some of slides clearer for the less-informed audience, i.e., me. MEL and I talked and then I shared these with her for her signoff. We are talking to David F on Monday morning.

Richard Witt
OGC Water Law Office
564-5496

Message

From: Wildeman, Anna [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=05DD0AF69BFA40429E438B7646502B99-WILDEMAN, A]
Sent: 7/11/2018 10:31:44 AM
To: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]
Subject: Fwd: Steam
Attachments: Reconsideration of Steam Electric ELGs; ATT00001.htm; Reconsideration of Steam Electric ELGs; ATT00002.htm; Reconsideration of Steam Electric ELGs; ATT00003.htm; Pre-brief Steam Electric call in 1-866-299-3188 passcode 202-564-0516; ATT00004.htm; Steam Electric ELG: Rulemaking Schedule Call in 1-866-299-3188 passcode 2025640516; ATT00005.htm; Pre-brief Steam Electric Call in 202-991-0477 passcode 3464665; ATT00006.htm

These attachments may have attachments, if so please print them. Thanks

Begin forwarded message:

From: "Fotouhi, David" <Fotouhi.David@epa.gov>
To: "Wildeman, Anna" <wildeman.anna@epa.gov>
Subject: Steam

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 10/30/2018 1:34:43 AM
To: jessannehall@[REDACTED]
Subject: Fwd: ELG - Order Dismissing Case
Attachments: ELG - Judgment.pdf; ATT00001.htm; ELG - Order Dismissing case.pdf; ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Eitel, Michael (ENRD)" <Michael.Eitel@usdoj.gov>
Date: October 29, 2018 at 7:37:59 PM EDT
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "O'Donnell, Jessica (ENRD)" <Jessica.O'Donnell@usdoj.gov>, "Hoshijima, Tsuki (ENRD)" <Tsuki.Hoshijima@usdoj.gov>, "Levine, MaryEllen" <levine.maryellen@epa.gov>
Cc: "Flax, Meredith (ENRD)" <Meredith.Flax@usdoj.gov>, "Barsky, Seth (ENRD)" <Seth.Barsky@usdoj.gov>
Subject: ELG - Order Dismissing Case

All – the Court issued the attached order today dismissing the case, and the court entered judgment in our favor. Thanks everyone for your help with this.
Mike

From: azddb_responses@azd.uscourts.gov <azddb_responses@azd.uscourts.gov>
Sent: Monday, October 29, 2018 5:20 PM
To: azddb_nefs@azd.uscourts.gov
Subject: Activity in Case 4:18-cv-00050-JAS Center for Biological Diversity v. Pruitt et al Order on Motion to Dismiss/Lack of Jurisdiction

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

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U.S. District Court

DISTRICT OF ARIZONA

Notice of Electronic Filing

The following transaction was entered on 10/29/2018 at 4:20 PM MST and filed on 10/29/2018

Case Name: Center for Biological Diversity v. Pruitt et al

Case Number: 4:18-cv-00050-JAS
Filer:
Document Number: 34

Docket Text:

ORDERED that the Federal Defendants' and the UWAG's [11], [27] Motions to Dismiss are granted. This case is dismissed. The Clerk of Court shall enter judgment and close the file in this case. Signed by Judge James A Soto on 10/29/2018. (BAR)

4:18-cv-00050-JAS Notice has been electronically mailed to:

Robert Ukeiley RUKEILEY@ [REDACTED]
ehp_docs@ [REDACTED]

Harry M Johnson, III pjohnson@ [REDACTED] sterrell@ [REDACTED]

Bradley Joseph Glass brad.glass@ [REDACTED] cyn.carlo@ [REDACTED]
joanne.hartley@ [REDACTED]

Michael R Eitel michael.eitel@usdoj.gov, efile_wmrs.enrd@usdoj.gov

Andrew J Turner aturner@ [REDACTED] sfisher@ [REDACTED]

Jennifer Lynn Loda jloda@ [REDACTED] celkins@ [REDACTED]

Hannah MM Connor hconnor@ [REDACTED] ehp_docs@ [REDACTED]

Timothy Louis McHugh tmchugh@ [REDACTED]

Kerry L McGrath kmcgrath@ [REDACTED]

Kristy AN Bulleit kbulleit@ [REDACTED] bpotter@ [REDACTED] smoore@ [REDACTED]

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Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1096393563 [Date=10/29/2018] [FileNumber=18335498-0] [3b784af7a701caf4e5a39943e650ae7fc08ec40cb5ca9092077042b830859038c01d2ac2c159e22eb9c90206eb89c21e039ba0d26c66786553b81205f61bfec]]

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 10/30/2018 1:34:43 AM
To: JESSANNEHALL@[REDACTED] o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=568ff15823d5404ca69a3fa7c92f2490-JESSANNEHAL
Subject: Fwd: ELG - Order Dismissing Case
Attachments: ELG - Judgment.pdf; ATT00001.htm; ELG - Order Dismissing case.pdf; ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Eitel, Michael (ENRD)" <Michael.Eitel@usdoj.gov>
Date: October 29, 2018 at 7:37:59 PM EDT
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "O'Donnell, Jessica (ENRD)" <Jessica.O'Donnell@usdoj.gov>, "Hoshijima, Tsuki (ENRD)" <Tsuki.Hoshijima@usdoj.gov>, "Levine, MaryEllen" <levine.maryellen@epa.gov>
Cc: "Flax, Meredith (ENRD)" <Meredith.Flax@usdoj.gov>, "Barsky, Seth (ENRD)" <Seth.Barsky@usdoj.gov>
Subject: ELG - Order Dismissing Case

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Mike

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To: azddb_nefs@azd.uscourts.gov
Subject: Activity in Case 4:18-cv-00050-JAS Center for Biological Diversity v. Pruitt et al Order on Motion to Dismiss/Lack of Jurisdiction

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Case Number: 4:18-cv-00050-JAS

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Bradley Joseph Glass brad.glass@, cyn.carlo@, joanne.hartley@

Michael R Eitel michael.eitel@usdoj.gov, efile_wmrs.enrd@usdoj.gov

Andrew J Turner aturner@, sfisher@

Jennifer Lynn Loda jloda@, celkins@

Hannah MM Connor hconnor@, ehp_docs@

Timothy Louis McHugh tmchugh@

Kerry L McGrath kmcgrath@

Kristy AN Bulleit kbulleit@, bpotter@, smoore@

4:18-cv-00050-JAS Notice will be sent by other means to those listed below if they are affected by this filing:

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Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1096393563 [Date=10/29/2018] [FileNumber=18335498-0] [3b784af7a701caf4e5a39943e650ae7fc08ec40cb5ca9092077042b830859038c01d2ac2c159e22eb9c90206eb89c21e039ba0d26c66786553b81205f61bfec]]

Message

From: White, Jessica C. (ENRD) [Jessica.C.White@usdoj.gov]
Sent: 12/12/2017 8:40:03 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]; Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
Subject: SWEPCO Redline
Attachments: V2_SWEPCO_REDLINE.docx

Attached.

Thanks!

Jessica C. White

Legal Assistant

Environmental Defense Section

Environment and Natural Resources Division

U.S. Department of Justice

(202) 514-2219

Message

From: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Sent: 1/31/2018 8:16:59 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Subject: FW: Activity in Case 1:17-cv-00817-DLF CLEAN WATER ACTION et al v. PRUITT et al Response to Document
Attachments: 075 Response to Supplemental Authority.pdf

Here's the response, as filed. Thanks Jessica.

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

From: DCD_ECFNotice@dcd.uscourts.gov [mailto:DCD_ECFNotice@dcd.uscourts.gov]
Sent: Wednesday, January 31, 2018 3:14 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:17-cv-00817-DLF CLEAN WATER ACTION et al v. PRUITT et al Response to Document

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U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered by Hoshijima, Tsuki on 1/31/2018 at 3:14 PM EDT and filed on 1/31/2018

Case Name: CLEAN WATER ACTION et al v. PRUITT et al
Case Number: 1:17-cv-00817-DLF
Filer: E. SCOTT PRUITT
U.S. ENVIRONMENTAL PROTECTION AGENCY
Document Number: 75

Docket Text:

RESPONSE re [74] NOTICE OF SUPPLEMENTAL AUTHORITY, filed by E. SCOTT PRUITT, U.S. ENVIRONMENTAL PROTECTION AGENCY. (Hoshijima, Tsuki)

1:17-cv-00817-DLF Notice has been electronically mailed to:

A. Kent Mayo [kent.mayo@\[REDACTED\]](mailto:kent.mayo@[REDACTED])

Abel J. Russ [aruss@\[REDACTED\]](mailto:aruss@[REDACTED])

Bethany A. Davis Noll [bethany.davisnoll@\[REDACTED\]](mailto:bethany.davisnoll@[REDACTED])

Casey Austin Roberts [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED])

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Jennifer C. Chavez [jchavez@\[REDACTED\]](mailto:jchavez@[REDACTED]) [alin@\[REDACTED\]](mailto:alin@[REDACTED]) [lfuhrmann@\[REDACTED\]](mailto:lfuhrmann@[REDACTED]),
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Thomas J. Cmar [tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED]) [adisa@\[REDACTED\]](mailto:adisa@[REDACTED]) [fchampenois@\[REDACTED\]](mailto:fchampenois@[REDACTED])
[gwinick@\[REDACTED\]](mailto:gwinick@[REDACTED]) [tcmar.earthjustice@\[REDACTED\]](mailto:tcmar.earthjustice@[REDACTED])

Tsuki Hoshijima tsuki.hoshijima@usdoj.gov, Angeline.Purdy@usdoj.gov,
EFILE_EDS.ENRD@USDOJ.GOV

1:17-cv-00817-DLF Notice will be delivered by other means to::

Samara L. Kline
BAKER & BOTTS, L.L.P.
2001 Ross Avenue
Suite 600
Dallas, TX 75201

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=1/31/2018] [FileNumber=5378826-0]
[a5d634c4b7c6100748bd41549bf71c4ed237711a50e5aa47b3b78112725c4a4ffdbb
1f72dc6db2cea4fa7627a0c89901941a679aed6c7437144cb30ef15294a2]]

Message

From: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Sent: 2/20/2018 10:43:42 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: FW: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al "Status Report"
Attachments: SWEPCO Status 2-20.pdf

As filed. [REDACTED]
 [REDACTED]

From: cmecf_caseprocessing@ca5.uscourts.gov [mailto:cmecf_caseprocessing@ca5.uscourts.gov]
Sent: Tuesday, February 20, 2018 5:41 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al "Status Report"

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United States Court of Appeals for the Fifth Circuit

Notice of Docket Activity

The following transaction was entered on 02/20/2018 at 4:41:08 PM CST and filed on 02/20/2018

Case Name: Southwestern Elec Power Co., et al v. EPA, et al
Case Number: 15-60821
Document(s): Document(s)

Docket Text:

STATUS REPORT from Respondents Mr. Scott Pruitt and EPA. Date of Service: 02/20/2018 via email - Attorney for Intervenors: Bulleit, Cmar, Gerhart, Johnson, Smith; Attorney for Petitioners: Grever, McHugh, Roberts, Sheehan, Sullivan; Attorney for Respondents: Hoshijima, McDermott, O'Donnell; US mail - Attorney for Respondent: Garbow. The next status report is due within 30 days from this date, until the matter is resolved. [15-60821] (Tsuki Hoshijima)

Notice will be electronically mailed to:

Ms. Jessica O'Donnell: jessica.o'donnell@usdoj.gov, EFILE_EDS.ENRD@USDOJ.GOV
 Mr. Martin Francis McDermott: martin.mcdermott@usdoj.gov, EFILE_EDS.ENRD@USDOJ.GOV
 Ms. Kristy A. N. Bulleit, Counsel: kbulleit@ [REDACTED] bpotter@ [REDACTED] smoore@ [REDACTED]

Mr. Joshua Smith: [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]) [lauren.hogrewe@\[REDACTED\]](mailto:lauren.hogrewe@[REDACTED])
Mr. Harry Margerum Johnson, III: [pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED]) [tmchugh@\[REDACTED\]](mailto:tmchugh@[REDACTED])
Mr. Thomas Joseph Cmar: [tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED]) [fchampanois@\[REDACTED\]](mailto:fchampanois@[REDACTED]) [gwinick@\[REDACTED\]](mailto:gwinick@[REDACTED])
Mr. Matthew Gerhart: [megerhart@\[REDACTED\]](mailto:megerhart@[REDACTED])
Ms. Casey Austin Roberts: [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]) [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED])
kathleen.krust@sierraclub.org, [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])
Mr. John Andrew Sheehan: [jasheehan@\[REDACTED\]](mailto:jasheehan@[REDACTED])
Mr. Sean Michael Sullivan: [sean.sullivan@\[REDACTED\]](mailto:sean.sullivan@[REDACTED])
Mr. Thomas J. Grever: [tgrever@\[REDACTED\]](mailto:tgrever@[REDACTED]) [smith@\[REDACTED\]](mailto:smith@[REDACTED]) [mbuchanan@\[REDACTED\]](mailto:mbuchanan@[REDACTED])
Mr. Timothy Louis McHugh: [tmchugh@\[REDACTED\]](mailto:tmchugh@[REDACTED])
Mr. Tsuki Hoshijima: tsuki.hoshijima@usdoj.gov

NOTICE WILL BE DELIVERED BY OTHER MEANS TO:

Mr. Avi S. Garbow
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
William Jefferson Clinton Building
Washington, DC 20460

The following document(s) are associated with this transaction:

Document Description: Status Report

Original Filename: SWEPCO Status 2-20.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1105048708 [Date=02/20/2018] [FileNumber=8707791-0]

[61da5ee1303bb50ee606579e8c0a486cf8578eed8bbbc5aca009383dc688c136c0cad6a655e469d2f25591741e6f9876b20bbd2b6eb90a21bb7d3623a2d074dd]]

Message

From: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Sent: 2/20/2018 10:42:12 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: FW: 17-1193 Clean Water Action, et al v. E. Pruitt, et al "Motion Filed" (EPA-82FR19005)
Attachments: Clean Water Action II motion to dismiss or alternatively to transfer.pdf

As filed, thanks Jessica.

From: ecfnoticing@cadc.uscourts.gov [mailto:ecfnoticing@cadc.uscourts.gov]
Sent: Tuesday, February 20, 2018 5:35 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: 17-1193 Clean Water Action, et al v. E. Pruitt, et al "Motion Filed" (EPA-82FR19005)

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United States Court of Appeals for District of Columbia Circuit

Notice of Docket Activity

The following transaction was entered on 02/20/2018 at 5:35:06 PM EST and filed on 02/20/2018

Case Name: Clean Water Action, et al v. E. Pruitt, et al
Case Number: 17-1193
Document(s): Document(s)

Docket Text:

MOTION [1718714] to remove case from abeyance, to dismiss case as moot (Response to Motion served by hand due on 03/02/2018). (Response to Motion served by mail due on 03/02/2018), to transfer case (Response to Motion served by hand due on 03/02/2018). (Response to Motion served by mail due on 03/02/2018) filed by E. Scott Pruitt and EPA (Service Date: 02/20/2018 by CM/ECF NDA) Length Certification: 4152 words. [17-1193] (Hoshijima, Tsuki)

Notice will be electronically mailed to:

Mr. Thomas Joseph Cmar: [tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED]) [fchampernois@\[REDACTED\]](mailto:fchampernois@[REDACTED]) [gwinick@\[REDACTED\]](mailto:gwinick@[REDACTED])
 Mr. Martin F. McDermott: martin.mcdermott@usdoj.gov, EFILE_EDS ENRD@USDOJ.GOV
 Patton Dycus: [pdycus@\[REDACTED\]](mailto:pdycus@[REDACTED])
 Joshua Douglas Smith, Attorney: [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]) [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])
 Matthew Gerhart: [megerhart@\[REDACTED\]](mailto:megerhart@[REDACTED]) [fchampernois@\[REDACTED\]](mailto:fchampernois@[REDACTED])

Casey Roberts: casey.roberts@[REDACTED] casey.roberts@[REDACTED] kathleen.krust@[REDACTED]
adela.jones@[REDACTED]

Tsuki Hoshijima: tsuki.hoshijima@usdoj.gov, efile_eds.enrd@usdoj.gov

The following document(s) are associated with this transaction:

Document Description: Motion Filed

Original Filename: CWA II dismiss or transfer.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1109186823 [Date=02/20/2018] [FileNumber=1718714-0]

[9c114205b5f36f14808d5be4135df8a2991ef37c9d3e314d1dcbf6b9e89a70873a578513ce6dc344696a9281b3c7
b4d386356a3ddf91a3d2d6f7e4d5c4c69d39]]

Message

From: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Sent: 3/23/2018 7:37:39 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Subject: FW: 18-60079 Clean Water Action, et al v. EPA, et al "Response/Opposition filed"
Attachments: UWAG opp.pdf; EPA opp.pdf

Attached are our and UWAG's opp to the motion for abeyance.

From: cmecf_caseprocessing@ca5.uscourts.gov <cmecf_caseprocessing@ca5.uscourts.gov>
Sent: Friday, March 23, 2018 3:36 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: 18-60079 Clean Water Action, et al v. EPA, et al "Response/Opposition filed"

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United States Court of Appeals for the Fifth Circuit

Notice of Docket Activity

The following transaction was entered on 03/23/2018 at 2:35:35 PM CDT and filed on 03/23/2018

Case Name: Clean Water Action, et al v. EPA, et al
Case Number: 18-60079
Document(s): Document(s)

Docket Text:

RESPONSE/OPPOSITION filed by Mr. Scott Pruitt and EPA [8734068-1] to the Motion to stay further proceedings in this court filed by Petitioners Waterkeeper Alliance, Incorporated, Environmental Integrity Project, Clean Water Action, Sierra Club, Prairie Rivers Network, PennEnvironment, Incorporated, Chesapeake Climate Action Network and Physicians for Social Responsibility, Chesapeake, Incorporated in 18-60079 [8725002-2], Motion for extraordinary relief filed by Petitioners Waterkeeper Alliance, Incorporated, Environmental Integrity Project, Clean Water Action, Sierra Club, Prairie Rivers Network, PennEnvironment, Incorporated, Chesapeake Climate Action Network and Physicians for Social Responsibility, Chesapeake, Incorporated in 18-60079 [8725002-3] Date of Service: 03/23/2018 via email - Attorney for Intervenors: Bulleit, Johnson, McHugh; Attorney for Petitioners: Clark-Leach, Cmar, Gerhart, Roberts, Smith; Attorney for Respondents: Hoshijima, McDermott; US mail - Attorney for Petitioner: Dycus; Attorney for Respondent: Garbow. [18-60079] (Tsuki Hoshijima)

Notice will be electronically mailed to:

Mr. Martin Francis McDermott: martin.mcdermott@usdoj.gov, EFILE_EDS.ENRD@USDOJ.GOV

Ms. Kristy A. N. Bulleit, Counsel: [kbulleit@\[REDACTED\]](mailto:kbulleit@[REDACTED]) [bpotter@\[REDACTED\]](mailto:bpotter@[REDACTED]) [smoore@\[REDACTED\]](mailto:smoore@[REDACTED])

Mr. Gabriel Paul Clark-Leach: [gclark-leach@\[REDACTED\]](mailto:gclark-leach@[REDACTED])

Mr. Joshua Smith: [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]), [lauren.hogrewe@\[REDACTED\]](mailto:lauren.hogrewe@[REDACTED])

Mr. Harry Margerum Johnson, III: [pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED]) [tmchugh@\[REDACTED\]](mailto:tmchugh@[REDACTED])

Mr. Thomas Joseph Cmar: [tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED]) [champenois@\[REDACTED\]](mailto:champenois@[REDACTED]) [gwinick@\[REDACTED\]](mailto:gwinick@[REDACTED])

Mr. Matthew Gerhart: [megerhart@\[REDACTED\]](mailto:megerhart@[REDACTED])

Ms. Casey Austin Roberts: [casey.roberts@s\[REDACTED\]](mailto:casey.roberts@s[REDACTED]) [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED])

[lauren.hogrewe@\[REDACTED\]](mailto:lauren.hogrewe@[REDACTED])

Mr. Timothy Louis McHugh: [tmchugh@\[REDACTED\]](mailto:tmchugh@[REDACTED])

Mr. Tsuki Hoshijima: tsuki.hoshijima@usdoj.gov

NOTICE WILL BE DELIVERED BY OTHER MEANS TO:

Mr. Avi S. Garbow
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1200 Pennsylvania Avenue, N.W.
William Jefferson Clinton Building
Washington, DC 20460

Mr. Patton Dycus
Environmental Integrity Project
1000 Vermont Avenue, N.W.
Washington, DC 20005

The following document(s) are associated with this transaction:

Document Description: Response/Opposition filed

Original Filename: CWA FILING.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1105048708 [Date=03/23/2018] [FileNumber=8734068-0]

[1710c328ada66cf4edf21d0cabe49a2587a0eafa8d345ac7c29009e93d825a2f3680cc21a93fe11da980f9b95f3432
c004b7b466f05eb6937aecef469a376c65]]

Attorneys for Federal Defendants

) CASE NO. 4:18-cv-00050-JAS
)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION TO DISMISS**

1 (“ESA”) and the National Environmental Policy Act (“NEPA”). But under the CWA’s
2 provisions for bifurcated judicial review, *all* challenges to effluent limitations – no matter their
3 statutory basis – must be brought in the Courts of Appeal. See 33 U.S.C. § 1369(b)(1)(E); See
4 Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005), rev’d on other grounds by Nat’l
5 Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). Accordingly, this Court
6 lacks jurisdiction over Plaintiff’s Complaint and should dismiss the action.
7

8 **LEGAL BACKGROUND**

9 **I. The Clean Water Act**

10 The CWA’s purpose is “to restore and maintain the chemical, physical, and biological
11 integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and prohibits the “discharge of any
12 pollutant” by “any person” except as authorized by the Act. 33 U.S.C. § 1311(a). One means of
13 authorization is the National Pollutant Discharge Elimination System (“NPDES”), which
14 provides for discharge permits for direct discharges to waters covered by the CWA.
15 Additionally, indirect dischargers – *i.e.*, those who discharge to publicly owned treatment works
16 (“POTWs”) – must comply with pretreatment standards. Both types of dischargers must comply
17 with certain requirements and conditions established under other provisions of the Act, including
18 technology-based effluent limitations and pretreatment standards. 33 U.S.C. §§ 1311(b),
19 1317(b), 1342(a); see generally Tex. Oil & Gas Ass’n v. EPA, 161 F.3d 923, 927 (5th Cir. 1998).
20
21
22

23 EPA promulgates nationally applicable technology-based effluent limitations and
24 standards governing the discharge of pollutants from existing sources under 33 U.S.C. §§
25 1311(b) and 1317(b). And it establishes new source performance standards and pretreatment
26 standards for new sources under 33 U.S.C. §§ 1316(a)(1) and 1317(c). In the ELG Rule, EPA
27 determined appropriate limits and standards based on the Best Available Technology
28

1 Economically Achievable (“BAT”). 80 Fed. Reg. 67,838, 67,841 (Nov. 3, 2015); 33 U.S.C. §
2 1311(b)(2)(A). In so doing, EPA was required to consider “the age of equipment and facilities
3 involved, the process employed, the engineering aspects of the application of various types of
4 control techniques, process changes, the cost of achieving such effluent reduction, non-water
5 quality environmental impact (including energy requirements), and such other factors as the
6 Administrator deems appropriate.” 33 U.S.C. § 1314(b)(2)(B). The Agency is afforded
7 considerable discretion in how to weigh these factors in making the ultimate decision as to what
8 constitutes BAT. See, e.g., Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1045 (D.C. Cir. 1978).

11 **II. The Endangered Species Act**

12 The ESA was enacted “to provide a means whereby the ecosystems upon which
13 endangered species and threatened species depend may be conserved, [and] to provide a program
14 for the conservation of such endangered species and threatened species” 16 U.S.C. §
15 1531(b). Under ESA Section 4, the United States Fish and Wildlife Service (“FWS”) and the
16 National Marine Fisheries Service (“NMFS”) may list species as “endangered” or “threatened,”
17 and may further designate “critical habitat” for listed species. Id. at § 1533.

19 The ESA does not impose a categorical “do no harm” prohibition with respect to listed
20 species. Instead, and as applicable here, “[e]ach Federal agency shall, in consultation with and
21 with the assistance of [FWS and NMFS], insure that any action authorized, funded, or carried out
22 by such agency . . . is not likely to jeopardize the continued existence of any endangered species
23 or threatened species or result in the destruction or adverse modification of [critical] habitat.”
24 16 U.S.C. § 1536(a)(2). The ESA’s implementing regulations prescribe this “consultation”
25 process in detail. See 50 C.F.R. §§ 402.10 – 402.16.

28 **III. The National Environmental Policy Act**

1 An “essentially procedural” statute, NEPA directs federal agencies to study and
2 document the environmental consequences of proposed actions. Vt. Yankee Nuclear Power
3 Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 558 (1978). See 42 U.S.C. § 4321 et seq. Thus,
4 NEPA itself “does not mandate particular results, but simply prescribes [a] necessary process.”
5 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citation omitted).
6 Regulations promulgated by the Council on Environmental Quality permit multiple methods of
7 NEPA compliance. 40 C.F.R. pts. 1500–1518; Robertson, 490 U.S. at 355–56. First, an agency
8 must prepare an Environmental Impact Statement – a detailed document subject to extensive
9 regulations regarding format, content, and methodology – for any proposed agency action
10 “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). See 40
11 C.F.R. § 1501.3. Second, the agency may prepare an Environmental Assessment. See id. §§
12 1501.4(b), 1508.9. Unlike an Environmental Impact Statement, an Environmental Assessment is
13 a “concise public document” that “[b]riefly provide[s] sufficient evidence and analysis for
14 determining whether” an Environmental Impact Statement is required. Id. at § 1508.9. If the
15 Environmental Assessment concludes with a “finding of no significant impact” (sometimes
16 referred to as a “FONSI”), no further NEPA analysis is necessary. See Native Ecosystems
17 Council v. U.S. Forest Serv., 428 F.3d 1233, 1239 (9th Cir. 2005).

21 PROCEDURAL BACKGROUND

22 On November 3, 2015, EPA promulgated CWA limitations on various types of
23 wastestreams discharged by new and existing steam electric power plants (the “ELG Rule”). 80
24 Fed. Reg. 67,838, 67,841-42 (Nov. 3, 2015). The Rule was challenged by various parties, and
25 petitions for review were consolidated in the Fifth Circuit. During the course of merits briefing,
26 petitioner Utility Water Act Group and the Small Business Administration sought administrative
27
28

1 reconsideration of the Rule and further requested that EPA administratively stay the ELG Rule.
2 In response, the Administrator determined that it was appropriate and in the public interest to
3 review the Rule, and therefore initiated reconsideration. 82 Fed. Reg. at 19,005.
4

5 The Administrator also determined that justice required a stay of the compliance
6 deadlines for certain limits and standards in the Rule under 5 U.S.C. § 705. 82 Fed. Reg. at
7 19,005 (the “Stay Notice”). In particular, the Stay Notice postponed the deadlines for new, more
8 stringent effluent limitations and pretreatment standards for existing facilities, applicable to five
9 waste streams regulated by the ELG Rule. Id. Absent the Stay Notice, these new limits and
10 standards would have been applicable to plants as early as November 1, 2018. The Administrator
11 postponed the relevant deadlines so that regulated parties would not spend millions of dollars to
12 comply with regulations that were subject to chance. Id. In light of the reconsideration, the
13 Administrator also sought and was granted a 120-day abeyance of the Fifth Circuit litigation.
14 See 82 Fed. Reg. at 19,005-06; Southwestern Electric Power Co. v. EPA, No. 15-60821, Doc.
15 No. 00513964356, (5th Cir. Apr. 24, 2017).
16
17

18 On August 11, 2017, Administrator Pruitt announced that EPA would conduct
19 rulemaking to potentially revise the effluent limitations and pretreatment standards for existing
20 facilities applicable to two waste streams: bottom ash transport water and flue gas desulfurization
21 wastewater. The Administrator then requested that the Fifth Circuit sever and hold in abeyance
22 challenges related to the limits and standards he was reconsidering, and to order the parties to
23 consult on an appropriate briefing schedule for remaining issues in the case. Southwestern
24 Electric Power Co. v. EPA, Doc. No. 00514115266 (5th Cir. Aug. 14, 2017). The Court granted
25 EPA’s motion. Southwestern Electric Power Co. v. EPA, Doc. No. 00514126308 (5th Cir. Aug.
26 22, 2017).
27
28

1 On May 25, 2017, the Administrator proposed a rule to postpone the same compliance
2 deadlines subject to the Stay Notice. 82 Fed. Reg. 26,017 (June 6, 2017). As the proposed rule
3 explained, “[b]ecause Section 705 of the APA authorizes an Agency to postpone the effective
4 date of an action pending judicial review, EPA is undertaking this notice and-comment
5 rulemaking to postpone certain compliance dates in the rule in the event that the litigation ends,
6 and while the Agency is undertaking reconsideration.” *Id.* at 26,018. On September 12, 2017,
7 the Administrator issued a final rule (the “Amendment Rule”) postponing by two years certain
8 ELG Rule compliance deadlines for the two wastestreams subject to reconsideration. 82 Fed.
9 Reg. 43,494 (Sept. 18, 2017). In particular, EPA amended 40 C.F.R. part 423 to extend the
10 earliest deadlines for compliance from November 1, 2018, to November 1, 2020, based on EPA’s
11 decision to undertake further rulemaking with respect to these limits and standards. The
12 Administrator determined that he would not extend the deadlines for limits or standards
13 applicable to other wastestreams because he is not now reconsidering those requirements.
14 Finally, the Administrator withdrew the Stay Notice. This litigation followed roughly five
15 months afterwards.

19 STANDARD OF REVIEW

20 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a motion to dismiss for lack
21 of subject matter jurisdiction, which may advance “facial attacks” or “factual attacks.” Safe Air
22 for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Defendants’ challenge to
23 Plaintiffs’ Complaint are facial attacks, in which “the challenger asserts that the allegations
24 contained in a complaint are insufficient on their face to invoke federal jurisdiction.” *Id.*
25 “Whether subject matter jurisdiction exists therefore does not depend on resolution of a factual
26
27
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1 dispute, but . . . on the allegations in [the] complaint[,]" which the Court must accept as true.
2 Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

3 4 ARGUMENT

5 I. This Court Lacks Jurisdiction Over Plaintiffs' Challenge

6 A. As A Challenge To Effluent Limitations, Plaintiffs' Claims Against The 7 Delay Rule Must Be Brought In The Court Of Appeals

8 The federal courts are courts of limited jurisdiction. Bender v. Williamsport Area Sch.
9 Dist., 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited
10 jurisdiction, and the burden of establishing the contrary rests upon the party asserting
11 jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citation
12 omitted). As relevant here, Section 509(b)(1) of the Clean Water Act vests federal courts of
13 appeals with original jurisdiction to review certain categories of EPA actions. 33 U.S.C. §
14 1369(b)(1). "Where that review is available, it is the exclusive means of challenging actions
15 covered by the statute." Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 608 (2013). EPA actions
16 that are directly and exclusively reviewable in the courts of appeals include actions "approving
17 or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or
18 1345 of [the Clean Water Act]." 33 U.S.C. § 1369(b)(1)(E). The ELG Rule is a promulgation of
19 effluent limitations within the meaning of Section 1369(b)(1)(E), and challenges to that Rule are
20 thus before the Court of Appeals for Fifth Circuit.

21
22 As an "effluent limitation," the Amendment Rule similarly falls within the scope of
23 Section 1369(b)(1)(E), and is therefore reviewable only in the Court of Appeals. The CWA
24 defines "effluent limitation" as "any restriction established by . . . the Administrator on
25 quantities, rates, and concentrations of . . . discharge[s]." 33 U.S.C.A. § 1362(11). The salient
26 feature of these actions is that they "impose restrictions on the discharge of certain pollutants."
27
28

1 Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 629 (2018). Under these definitions, the
2 Amendment Rule is therefore an effluent limitation because its sole purpose is to impose
3 restrictions on limitation for various restrictions of pollutants. For two waste streams at existing
4 sources, the Rule establishes schedules of compliance beginning in 2020. 82 Fed. Reg. at 43494.
5 For the remaining waste streams at issue in the ELG Rule, the Amendment Rule establishes
6 schedules of compliance beginning in 2018. Id. Such nationwide restrictions are reviewable
7 only in the Court of Appeals. 33 U.S.C. § 1369(b)(1)(E). Cf. Council of S. Mountains, Inc. v.
8 Donovan, 653 F.2d 573, 579 n. 26 (D.C. Cir. 1981) (explaining that an order deferring
9 implementation of regulations subject to exclusive appellate review was “in effect an
10 amendment” to those regulations, such that the order was likewise reviewable by the Circuit
11 Court); Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 759–60 (3d Cir. 1982) (treating action
12 postponing effective date of regulations governing discharge of toxic pollutants into publicly
13 owned treatment works under 33 U.S.C. § 1317(b)(1) as a final action subject to jurisdiction
14 under 33 U.S.C. § 1369(b)(1)(C)).

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18 **B. Plaintiff May Not Circumvent The CWA's Bifurcated Judicial Review**
19 **Provision By Bringing NEPA and ESA Claims**

20 Statutory provisions providing for exclusive review of certain agency action in the Courts
21 of Appeals provide the “specific, complete and exclusive mode for judicial review” of that
22 action. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958). Thus, “[s]pecific
23 grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to
24 the district courts. A contrary holding would encourage circumvention of Congress's particular
25 jurisdictional assignment. It would also result in fractured judicial review of agency decisions,
26 with all of its attendant confusion, delay, and expense.” Carpenter v. Dep't of Transp., 13 F.3d
27 313, 316 (9th Cir. 1994) (citation omitted). See also Pub. Util. Comm'r of Or. v. Bonneville
28

1 Power Admin., 767 F.2d 622, 626 (9th Cir. 1985). Exclusive review provisions “thereby
2 necessarily preclude[] de novo litigation between the parties of all issues inhering in the
3 controversy, and all other modes of judicial review.” City of Tacoma, 357 U.S. at 336. In short,
4 “all objections” to the agency action “must be made in the Court of Appeals or not at all.” Id.
5

6 These principles command that Plaintiffs’ NEPA and ESA challenges may be brought in
7 the Court of Appeals. See Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005), rev’d on
8 other grounds by Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

9 In Defenders, the EPA action at issue was its decision – made after ESA consultation – to
10 approve transfer of the National Pollutant Discharge Elimination System permit program to the
11 State of Arizona. Plaintiffs then filed both a petition in the Ninth Circuit (seeking review of
12 EPA’s decision under the CWA) and a district court challenge (seeking review of ESA
13 consultation under that statute and the ESA). The Ninth Circuit ultimately rejected the argument
14 that Section 1369(b) authorized review of EPA’s action but not the underlying consultation,
15 noting the “virtually determinative effect” that consultation may have on decisions made under
16 the CWA. Id. (quoting Bennett v. Spear, 520 U.S. 154, 170 (1997)).¹ So too here: despite
17
18
19

20
21 ¹ The principle articulated in Defenders of Wildlife applies to a variety of bifurcated judicial
22 review schemes and across Circuits. See Ctr. for Biological Diversity v. U.S. Env’tl. Prot.
23 Agency, 847 F.3d 1075, 1089 (9th Cir. 2017) (requiring review in the Court of Appeals under the
24 Federal Insecticide, Fungicide, and Rodenticide Act’s analogous provisions because Plaintiff’s
25 ESA claims “inherently challenge the validity of the EPA’s final [pesticide] registration and
26 reregistration orders.”); Ctr. for Biological Diversity v. Env’tl. Prot. Agency, 861 F.3d 174, 187
27 (D.C. Cir. 2017) (same); City of Tacoma v. FERC, 460 F.3d 53, 76 (D.C. Cir. 2006) (“when a
28 [Biological Opinion] is prepared in the course of a [Federal Energy Regulatory Commission]
proceeding, the only means of challenging the substantive validity of the [Biological Opinion] is
on review of FERC’s decision in the court of appeals”); Am. Bird, 545 F.3d at 1192 (finding that
jurisdiction to review an ESA § 7 failure to consult challenge to the Federal Communication
Commission’s decision to license seven communications towers lied exclusively in the courts of
appeals pursuant to a Communications Act special jurisdictional grant); Turtle Island Restoration
Network v. U.S. Dep’t of Commerce, 438 F.3d 937, 939 (9th Cir. 2006) (holding that a challenge

1 bringing claims under NEPA and the ESA, Plaintiff's ultimate aim is to "enjoin, vacate, and
2 remand" the Amendment Rule, a set of effluent limitations under the CWA. ECF No 1 at 18.
3 Because Plaintiff's ESA and NEPA claims are inexorably intertwined with its underlying
4 argument that the Amendment Rule is "contrary to law" and should be set aside, *id.* at 17, it must
5 bring those claims in the Court of Appeals under 33 U.S.C. § 1369(b).
6

7 8 CONCLUSION

9 For the reasons set forth above, the Court should dismiss Plaintiff's Complaint.

10 DATED: February 28, 2018
11

12 Respectfully Submitted,

13 JEFFREY H. WOOD,
14 Acting Assistant Attorney General
15 SETH M. BARSKY, Chief
16 MEREDITH L. FLAX,
17 Assistant Chief
18 /s/ Travis J. Annatoyn
19 TRAVIS J. ANNATOYN
20 Trial Attorney
21 U.S. Department of Justice
22 Environment & Natural Resources Division
23 Wildlife & Marine Resources Section
24 Ben Franklin Station, P.O. Box 7611
25 Washington, D.C. 20044-7611
26 (202) 514-5243 (tel)
27 (202) 305-0275 (fax)
28 travis.annatoyn@usdoj.gov

Attorneys for Federal Defendants

26 _____
27 to National Marine Fisheries Service regulations which alleged violations of the Migratory Bird
28 Treaty Act, ESA, and NEPA, was "appropriately characterized as an attack on the regulations
reopening the fishery" which was governed by the Magnuson-Stevens Fishery Conservation and
Management Act's jurisdictional grant and barred by its 30-day statute of limitations).

Message

From: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Sent: 12/10/2017 1:38:51 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: RE: Just got your voicemail
Attachments: ENV_DEFENSE-#828478-v2-swepeco_draft_merits_brief_12_10_2017_jod_revisions.DOCX

[REDACTED]

[REDACTED]

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Saturday, December 9, 2017 6:06 PM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Subject: Fwd: Just got your voicemail

[REDACTED]

Sent from my iPhone

Begin forwarded message:

From: Mary Ellen Levine <dclevines@[REDACTED]>
Date: December 9, 2017 at 4:30:46 PM EST
To: Jessica Zomer <zomer.jessica@epa.gov>
Subject: Just got your voicemail

It is fine to send the brief with your edits back to D o J; I will look at it tomorrow to engage in the one issue and see if there are any showstoppers. I am not available this evening and tonight.

- Mary Ellen

Message

From: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Sent: 11/13/2017 11:37:08 PM
To: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
Subject: transfer motion as filed today
Attachments: Document (1).pdf

Flag: Follow up

Message

From: Benware, Richard [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=4B2E011A22A44312A04299F118CC4D11-BENWARE, RICHARD]
Sent: 3/7/2018 2:40:13 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]; martin.mcdermott@usdoj.gov
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation
Attachments: Data Excerpts from the Steam Electric Technical Questionnaire.pdf

Jessica/Martin,

Here is an updated one [REDACTED] Let me know if there's anything else you guys need.

Best,
-Richard

From: Zomer, Jessica
Sent: Wednesday, March 07, 2018 7:26 AM
To: martin.mcdermott@usdoj.gov
Cc: Benware, Richard <Benware.Richard@epa.gov>
Subject: Fwd: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Martin,

Richard sent a pdf last night with excerpts from the database. [REDACTED]

Richard: [REDACTED]

Begin forwarded message:

From: "Benware, Richard" <Benware.Richard@epa.gov>
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "McDermott, Martin (ENRD)" <Martin.McDermott@usdoj.gov>, "Jordan, Ronald" <Jordan.Ronald@epa.gov>
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Jessica,

[REDACTED]

Best,
-Richard

-----Original Message-----
From: Zomer, Jessica

Sent: Tuesday, March 06, 2018 4:04 PM
 To: McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>; Benware, Richard <Benware.Richard@epa.gov>
 Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Martin,

[REDACTED]

(Wednesday).

Jessica

-----Original Message-----

From: McDermott, Martin (ENRD) [<mailto:Martin.McDermott@usdoj.gov>]
 Sent: Tuesday, March 06, 2018 3:58 PM
 To: Zomer, Jessica <Zomer.Jessica@epa.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>
 Subject: FW: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

-----Original Message-----

From: Thomas Cmar [[mailto:tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED])]
 Sent: Friday, March 2, 2018 6:05 PM
 To: Johnson, Harry M. Pete <[pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])>; joshua.smith@s[REDACTED]; Mr. Matthew Gerhart: <[megerhart@\[REDACTED\]](mailto:megerhart@[REDACTED])>; Flora Champenois <[fchampenois@\[REDACTED\]](mailto:fchampenois@[REDACTED])>; casey.roberts@s[REDACTED]
 Cc: tgrever@s[REDACTED]; njsmith@s[REDACTED]; mbuchanan@s[REDACTED] Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Mr. John Andrew Sheehan: <[jasheehan@\[REDACTED\]](mailto:jasheehan@[REDACTED])>; Sean Sullivan [REDACTED] McHugh, Timothy L. <[TMcHugh@\[REDACTED\]](mailto:TMcHugh@[REDACTED])>; Bulleit, Kristy <[kbulleit@\[REDACTED\]](mailto:kbulleit@[REDACTED])>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
 Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Hi all,

Following up on this email from yesterday, I'm attaching two Word documents here.

The first is an initial draft table of contents for the joint appendix. It has a separate entry for each document from the certified index we believe should be included in the appendix. Below each entry, there are notes from us in red as to which portions of the document we believe should be included.

The second document is a compiled list of citations from each of the relevant briefs concerning Environmental Petitioners' claims, which we used as the starting point for drafting the Table of Contents. I'm including this for your reference in case it's helpful in reviewing the draft TOC.

Please let us know if you have any changes to propose to the list of documents (and which

portions of those documents) we propose to include in the joint appendix. I ask that you get back to us no later than COB next Tuesday 3/6 to allow for adequate time for us to prepare the joint appendix for filing.

I'm happy to talk next week if there is anything you would like to discuss by phone.

Thanks,

Thom

-----Original Message-----

From: Thomas Cmar

Sent: Thursday, March 01, 2018 3:30 PM

To: 'Johnson, Harry M. Pete'; [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]); Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]); [kathleen.krust@\[REDACTED\]](mailto:kathleen.krust@[REDACTED]); Lauren Hogrewe

Cc: [tgrever@\[REDACTED\]](mailto:tgrever@[REDACTED]); [njsmith@\[REDACTED\]](mailto:njsmith@[REDACTED]); [mbuchanan@\[REDACTED\]](mailto:mbuchanan@[REDACTED]); Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; [Sean.Sullivan@\[REDACTED\]](mailto:Sean.Sullivan@[REDACTED]); McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)

Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Hi Pete,

We are compiling the appendix and should have something ready for the parties to start reviewing by tomorrow. We don't have any questions about the citations in your brief. I did send a question to counsel for EPA yesterday about whether EPA wanted to include a lengthy spreadsheet cited in its brief in the joint appendix and am still waiting to hear back on that.

Thanks,

Thom

-----Original Message-----

From: Johnson, Harry M. Pete [[mailto:pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])]

Sent: Thursday, March 01, 2018 3:03 PM

To: Thomas Cmar; [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]); Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]); [kathleen.krust@\[REDACTED\]](mailto:kathleen.krust@[REDACTED]); Lauren Hogrewe

Cc: [tgrever@\[REDACTED\]](mailto:tgrever@[REDACTED]); [njsmith@\[REDACTED\]](mailto:njsmith@[REDACTED]); [mbuchanan@\[REDACTED\]](mailto:mbuchanan@[REDACTED]); Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; [Sean.Sullivan@\[REDACTED\]](mailto:Sean.Sullivan@[REDACTED]); McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)

Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Tom,

Just following up to make sure environmental petitioners are not looking for anything from us for the joint appendix due next week. Our brief's citations should be pretty straightforward for

inclusion in the JA.

Regards,

Pete

Harry M. ("Pete") Johnson, III
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Phone: [REDACTED]
Fax: (804) 343-4538
eMail: [pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])
website: www.hunton.com

-----Original Message-----

From: Thomas Cmar [[mailto:tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED])]
Sent: Tuesday, February 20, 2018 11:14 AM
To: Johnson, Harry M. Pete; [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]); Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]); [kathleen.krust@\[REDACTED\]](mailto:kathleen.krust@[REDACTED]); [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])
Cc: [tgrever@\[REDACTED\]](mailto:tgrever@[REDACTED]); [njsmith@\[REDACTED\]](mailto:njsmith@[REDACTED]); [mbuchanan@\[REDACTED\]](mailto:mbuchanan@[REDACTED]); Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; [Sean.Sullivan@\[REDACTED\]](mailto:Sean.Sullivan@[REDACTED]); McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Thanks, Pete. We will be in touch after our reply brief is filed to touch base about the appendix (which is due on March 8).

-----Original Message-----

From: Johnson, Harry M. Pete [[mailto:pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])]
Sent: Tuesday, February 20, 2018 9:26 AM
To: Thomas Cmar; [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]); Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]); [kathleen.krust@\[REDACTED\]](mailto:kathleen.krust@[REDACTED]); [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])
Cc: [tgrever@\[REDACTED\]](mailto:tgrever@[REDACTED]); [njsmith@\[REDACTED\]](mailto:njsmith@[REDACTED]); [mbuchanan@\[REDACTED\]](mailto:mbuchanan@[REDACTED]); Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; [Sean.Sullivan@\[REDACTED\]](mailto:Sean.Sullivan@[REDACTED]); McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)
Subject: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Counsel,

In advance of the deadline for filing the Joint Appendix, we wanted to check in to confirm environmental petitioners' plans for preparing it. Are you expecting anything from industry petitioners? Thanks.

Regards,


Harry M. ("Pete") Johnson, III

HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Phone: [REDACTED]
Fax: (804) 343-4538
eMail: [pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])
website: www.hunton.com

Message

From: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Sent: 11/10/2017 8:20:38 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
Subject: FW: D.C. Cir. Case No. 17-1216 -- protective petition matter
Attachments: 2017-09-21 Enviros_Motion to Hold Case in Abeyance.pdf

FYI

From: Thomas Cmar [mailto:tcmar@
Sent: Thursday, November 09, 2017 10:27 PM
To: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Subject: D.C. Cir. Case No. 17-1216 -- protective petition matter

Hi Martin and Jessica,

I'm writing concerning D.C. Circuit Case No. 17-1216 (*Clean Water Action, et al. v. Pruitt*), which is our protective petition filing concerning EPA's September 18, 2017 rule delaying certain steam electric ELG compliance deadlines. No attorney from DOJ has yet entered an appearance in the case on EPA's behalf, but I am reaching out to the two of you to see if you know if someone is planning to appear. We have a deadline on Monday to make our initial filings in the case, and we intend to make a motion to hold the case in abeyance similar to the motion that we made in our protective petition matter concerning the April 25, 2017 administrative stay of steam electric ELG rule deadlines (a copy of that motion is attached for reference). We would like to know whether EPA will take a position on our motion.

Please feel free to give me a call if you would like to discuss.

Best,

Thom

Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301


The information contained in this email message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments.

*please consider the environment before printing

Message

From: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Sent: 5/18/2018 6:15:58 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: FW: 17-1193 Clean Water Action, et al v. E. Pruitt, et al "Motion Filed" (EPA-82FR19005)
Attachments: CWA II petitioners motion to govern.pdf; CWA II United States motion to govern.pdf

Hi Jessica, here is Petitioners motion to govern, as well as ours as filed. Thanks.

From: ecfnoticing@cadc.uscourts.gov <ecfnoticing@cadc.uscourts.gov>
Sent: Friday, May 18, 2018 11:54 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: 17-1193 Clean Water Action, et al v. E. Pruitt, et al "Motion Filed" (EPA-82FR19005)

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

United States Court of Appeals for District of Columbia Circuit

Notice of Docket Activity

The following transaction was entered on 05/18/2018 at 11:54:13 AM EDT and filed on 05/18/2018

Case Name: Clean Water Action, et al v. E. Pruitt, et al
Case Number: 17-1193
Document(s): Document(s)

Docket Text:

MOTION [1731698] to govern future proceedings filed by Chesapeake Climate Action Network, Clean Water Action, Environmental Integrity Project, PennEnvironment, Physicians for Social Responsibility, Chesapeake, Inc., Prairie Rivers Network, Sierra Club and Waterkeeper Alliance, Inc. (Service Date: 05/18/2018 by CM/ECF NDA) Length Certification: 1,451 Words. [17-1193] (Cmar, Thomas)

Notice will be electronically mailed to:

Mr. Thomas Joseph Cmar: tcmar@[REDACTED], fchampernois@[REDACTED], gwinick@[REDACTED]
 Mr. Martin F. McDermott: martin.mcdermott@usdoj.gov, EFILE_EDS_ENRD@USDOJ.GOV
 Patton Dycus: pdycus@[REDACTED]
 Joshua Douglas Smith, Attorney: joshua.smith@[REDACTED], adela.jones@[REDACTED]
 Matthew Gerhart: megerhart@[REDACTED], fchampernois@[REDACTED]
 Casey Roberts: casey.roberts@[REDACTED], casey.roberts@[REDACTED], kathleen.krust@[REDACTED]

adela.jones@

Tsuki Hoshijima: tsuki.hoshijima@usdoj.gov, efile_eds_enrd@usdoj.gov

The following document(s) are associated with this transaction.

Document Description: Motion Filed

Original Filename: DCC 17-1193_Motion to Govern 05-18-2018_FINAL.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1109186823 [Date=05/18/2018] [FileNumber=1731698-0]

[267535227f9d969732c705b263023fb8f88ebdc1d2938780b45451326170e7e5da6dea2ad11e35a85afd0bca92539c282975eeaea492de751bf350621357562b]]

Message

From: Lundman, Robert (ENRD) [Robert.Lundman@usdoj.gov]
Sent: 6/18/2018 1:08:19 PM
To: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]; Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
Subject: FW: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)
Attachments: APPELLATE-#365695-v1-Clean_Water_Action_--_initial_scheduling_order.PDF

Hi all: As Jessica O. and Tsuki have heard, I am the ENRD appellate attorney assigned to this appeal. I look forward to working with all of you!

[REDACTED]

[REDACTED]

Bob

Robert J. Lundman
Environment and Natural Resources Division
U.S. Department of Justice
Phone: 202-514-2496

From: Thomas Cmar <tcmar@[REDACTED]>
Sent: Monday, June 18, 2018 7:49 AM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; Toth, Brian (ENRD) <BToth@ENRD.USDOJ.GOV>
Subject: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Dear Counsel:

I see that you recently appeared on behalf of EPA in the above-captioned matter. I am writing on behalf of the Appellants to confer concerning a procedural motion that we intend to make by this Wednesday, June 20.

We intend to request that the Court sever and hold in abeyance the issue in our appeal of the district court's denial of leave to amend and supplement our complaint to assert new claims challenging EPA's September 2017 rule delaying certain Effluent Limitation Guidelines compliance deadlines by two years (the "Delay Rule"). Our reason for seeking the abeyance is that, as you likely know, we are currently briefing the merits of the same claims in *Clean Water Action v. U.S. Environmental Protection Agency*, Case No. 18-60079 (5th Cir.).

We believe that holding our appeal of the jurisdiction issue in abeyance is appropriate pending the outcome of the Fifth Circuit proceeding is appropriate because, notwithstanding the district court's decision, the issue of whether district or appeals courts have original jurisdiction over the Delay Rule has not been finally resolved. For example, it is possible that the Fifth Circuit will, *sua sponte*, consider whether it has jurisdiction to review the Delay Rule and conclude that it does not, ruling instead that challenges to the Delay Rule must proceed in district courts. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to satisfy

itself . . . of its own jurisdiction”) (internal quotation marks and citation omitted). In addition, at least one other party is challenging the Delay Rule in district court; in that case, pending in the District of Arizona, there are pending motions concerning this same jurisdictional issue. *See Center for Biological Diversity v. Pruitt*, Case No. 4:18-cv-00050-TUC-JAS. However, if the Fifth Circuit issues a decision on the merits of Appellants’ Delay Rule claims, that would likely obviate the need for any further proceedings in the D.C. Circuit concerning those claims.

Please note that we are seeking an abeyance of their appeal of the district court’s holding on their Delay Rule claims only. We are also appealing the district court’s holding that our claims challenging EPA’s April 2017 administrative stay of the ELG rule are moot. We will request that the Court set a briefing schedule on that issue.

Could you let me know if EPA will take a position on our motion to sever and hold in abeyance our appeal on the Delay Rule claims? The favor of your reply by Wednesday at 12:00 Eastern would be much appreciated.

Please feel free to give me a call on my cell if you would like to discuss this matter by phone.

Thanks,

Thom Cmar

Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301
[REDACTED]

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*please consider the environment before printing

Message

From: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Sent: 11/8/2017 2:56:44 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: RE: Steam Electric CADC Postponement Rule -- draft motion to transfer

Thank you Jessica, much appreciated.

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Wednesday, November 08, 2017 9:50 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Subject: RE: Steam Electric CADC Postponement Rule -- draft motion to transfer

Hi Tsuki,

Attached are comments from EPA on the motion to transfer. [REDACTED]

[REDACTED] Nice work!

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 06, 2017 5:49 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>
Subject: Steam Electric CADC Postponement Rule -- draft motion to transfer

Hi Jessica,

Here is a draft motion to transfer for the Postponement Rule "protective petition." [REDACTED]

Thanks,
Tsuki

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message


From: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Sent: 11/1/2017 3:11:03 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]; Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: RE: steam electric - call re transfer

Ok. Also, just fyi, I have to leave no later than 4:45. Hopefully, this will not take more than ½ hour.

Martin and Tsuki – let's meet in the Zuggy conference room.

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Wednesday, November 01, 2017 9:30 AM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: RE: steam electric - call re transfer

Great. You can use this conference line: 202-564-1700 extension 

From: O'Donnell, Jessica (ENRD) [mailto:Jessica.O'Donnell@usdoj.gov]
Sent: Wednesday, November 01, 2017 8:21 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Subject: Re: steam electric - call re transfer

I'm going to try to reserve a conference room for the three of us here at DOJ. Is there a number where we can reach you, Jessica?

Sent from my iPhone

On Oct 27, 2017, at 12:09 PM, Zomer, Jessica <Zomer.Jessica@epa.gov> wrote:

Okay, terrific. Please let me know if you will be all together and whether there is one number at which I can reach you.

If not, I will provide a conference line.

From: McDermott, Martin (ENRD) [mailto:Martin.McDermott@usdoj.gov]
Sent: Wednesday, October 25, 2017 5:03 PM
To: Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>; O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: steam electric - call re transfer

I believe that will work for me. Martin

From: Hoshijima, Tsuki (ENRD)
Sent: Wednesday, October 25, 2017 4:56 PM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Subject: RE: steam electric - call re transfer

That'll work for me too.

From: O'Donnell, Jessica (ENRD)
Sent: Wednesday, October 25, 2017 1:33 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: RE: steam electric - call re transfer

I am available then.

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

From: Zomer, Jessica [<mailto:Zomer.Jessica@epa.gov>]
Sent: Wednesday, October 25, 2017 1:29 PM
To: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: RE: steam electric - call re transfer

I has been rescheduled for Wednesday November 1 at 4pm. Can you make that?

From: McDermott, Martin (ENRD) [<mailto:Martin.McDermott@usdoj.gov>]
Sent: Wednesday, October 25, 2017 12:53 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>; O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>
Cc: Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Subject: RE: steam electric - call re transfer

Ok. Let us know, thx

From: Zomer, Jessica [<mailto:Zomer.Jessica@epa.gov>]
Sent: Wednesday, October 25, 2017 11:21 AM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Subject: Re: steam electric - call re transfer

I heard that it will be rescheduled so stay tuned. Sorry!!

Sent from my iPhone

On Oct 25, 2017, at 11:14 AM, O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov> wrote:

Jessica –

Can you confirm that we are having a call on Thursday at 10 am to discuss

[REDACTED]

number? Also, please include Martin on the invite.

Thanks,
Jessica

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

Message

From: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Sent: 11/15/2017 4:40:50 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: uwag dc cir transfer filing in case you don't have it
Attachments: 17-1216_Documents.pdf

Message

From: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Sent: 11/14/2017 8:24:10 PM
To: Zomer, Jessica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a5c30484c1704ec79addf362bf776ed6-Hall, Jessica]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: Clean Water Action filings
Attachments: UWAG Motion to Intervene.pdf; Petitioners Motion for Abeyance.pdf

Flag: Follow up

Hi Jessica,

Here are the other motions that were filed yesterday.

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 10/10/2018 11:50:57 AM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: Re: Steam Postponement Rule -- question from intervenors


Looking through the comments this morning.

On Oct 10, 2018, at 7:31 AM, Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov> wrote:

Hi Jessica, I'm following up this question. Any thoughts from EPA on this possible argument by Intervenorers? Thanks.

From: Hoshijima, Tsuki (ENRD)
Sent: Friday, October 5, 2018 11:30 AM
To: Zomer, Jessica (Zomer.Jessica@epa.gov) <Zomer.Jessica@epa.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: Steam Postponement Rule -- question from intervenors

Hi Jessica,



Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 9/19/2018 3:28:46 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]; Roberts, Kathleen (ENRD) [Kathleen.Roberts@usdoj.gov]
Subject: RE: moot attendees

Yes, here is a list.

Jessica Zomer
Mary Ellen Levine
Jan Matuszko
Rob Wood (maybe)

From: McDermott, Martin (ENRD) [mailto:Martin.McDermott@usdoj.gov]
Sent: Wednesday, September 19, 2018 11:27 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>; Roberts, Kathleen (ENRD) <Kathleen.Roberts@usdoj.gov>
Subject: RE: moot attendees

JayZee --- At your convenience, prior to moot could you provide list of EPA folks needing building access tomorrow? McD

From: Zomer, Jessica <Zomer.Jessica@epa.gov>
Sent: Tuesday, September 18, 2018 3:01 PM
To: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Subject: Re: [REDACTED]
forward?

[REDACTED]

[REDACTED]

From: McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>
Sent: Tuesday, September 18, 2018 2:14 PM
To: Zomer, Jessica
Subject: [REDACTED]
forward?

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 9/4/2018 7:57:56 PM
To: Lundman, Robert (ENRD) [Robert.Lundman@usdoj.gov]
CC: Witt, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fbcc13f5878c4ef4b7b880de0221b9f9-RWITT]
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Thanks much, Bob. [REDACTED]
[REDACTED]

From: Lundman, Robert (ENRD) [mailto:Robert.Lundman@usdoj.gov]
Sent: Tuesday, September 04, 2018 1:58 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Witt, Richard <Witt.Richard@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Jessica—welcome back! Here are the filings (plaintiffs' motion, our response, and plaintiffs' reply) from June-July. [REDACTED]
awh [REDACTED]
Circuit.

Bob

Robert J. Lundman
Environment and Natural Resources Division
U.S. Department of Justice
Phone: 202-514-2496

From: Zomer, Jessica <Zomer.Jessica@epa.gov>
Sent: Tuesday, September 4, 2018 1:50 PM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Cc: Witt, Richard <Witt.Richard@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)


Hi Bob,

I'm back from maternity leave. Would you mind sending me a copy of any filings we made at the end of June thereafter in this case? What's the status of the case?

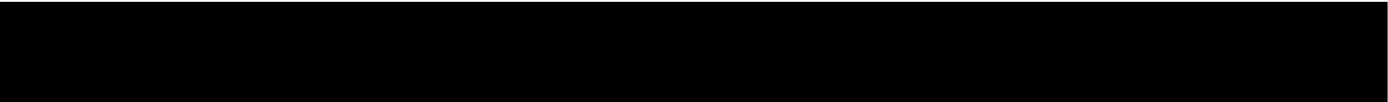
Thanks so much,
Jessica

From: Lundman, Robert (ENRD) [mailto:Robert.Lundman@usdoj.gov]
Sent: Wednesday, June 20, 2018 11:33 AM

To: Levine, MaryEllen <levine.maryellen@epa.gov>; O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Cc: Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)



From: Levine, MaryEllen <levine.maryellen@epa.gov>
Sent: Wednesday, June 20, 2018 11:27 AM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)



- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345


From: Lundman, Robert (ENRD) [<mailto:Robert.Lundman@usdoj.gov>]
Sent: Wednesday, June 20, 2018 9:44 AM
To: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Any final thoughts before I email plaintiffs? I will do that in the next hour or so, and then will get the certificate ready for filing. Thanks!

Bob


From: O'Donnell, Jessica (ENRD)
Sent: Tuesday, June 19, 2018 5:14 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Thanks, Tsuki and Bob.
notice.

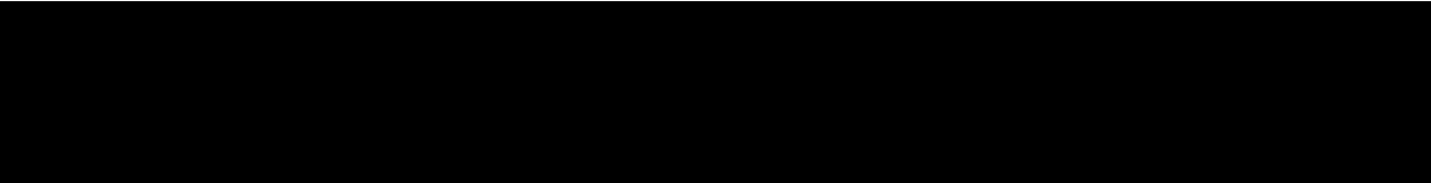


Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

From: Hoshijima, Tsuki (ENRD)
Sent: Tuesday, June 19, 2018 5:05 PM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)




From: Lundman, Robert (ENRD)
Sent: Tuesday, June 19, 2018 5:02 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)




Bob

From: Hoshijima, Tsuki (ENRD)
Sent: Tuesday, June 19, 2018 4:55 PM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)



From: Lundman, Robert (ENRD)
Sent: Tuesday, June 19, 2018 11:29 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)





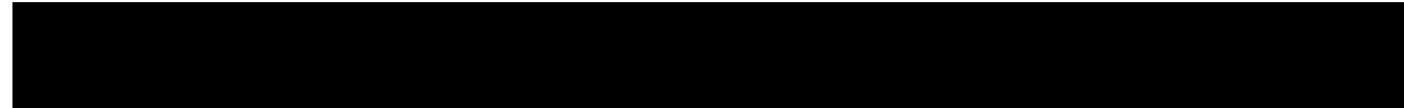
Bob

From: Hoshijima, Tsuki (ENRD)
Sent: Monday, June 18, 2018 6:02 PM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Bob,

Here is the Fifth Circuit briefing schedule:
July 12, 2018: Petitioners' Brief
September 17, 2018: Respondents' Brief
October 17, 2018: Intervenor UWAG's Brief
November 16, 2018: Petitioners' Reply Brief
December 6, 2018: Joint Appendix

I'll let Jessica answer the question about partial stay of an appeal, since she has much more experience with appellate matters.



Tsuki

From: Lundman, Robert (ENRD)
Sent: Monday, June 18, 2018 2:43 PM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi all: thanks for your responses!

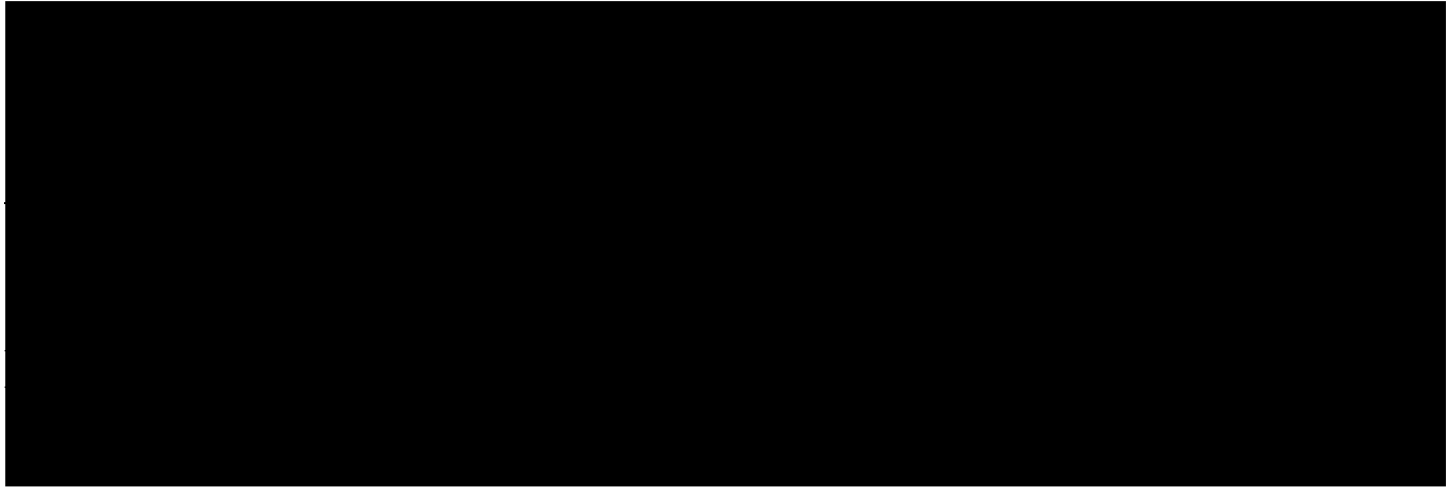


Thanks!

Bob

From: O'Donnell, Jessica (ENRD)
Sent: Monday, June 18, 2018 9:42 AM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>; witt.richard@epa.gov; zomer.jessica@epa.gov
Subject: Re: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Bob -



I'm teleworking today. If you'd like to reach me, my cell is [REDACTED]

Jessica

Sent from my iPhone

On Jun 18, 2018, at 9:13 AM, Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV> wrote:

Hello again: I've added Mary Ellen and Richard to the email, as it appears Jessica Zomer is on leave. Thanks!

Bob

From: Lundman, Robert (ENRD)
Sent: Monday, June 18, 2018 9:08 AM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; 'zomer.jessica@epa.gov' <zomer.jessica@epa.gov>
Subject: FW: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi all: As Jessica O. and Tsuki have heard, I am the ENRD appellate attorney assigned to this appeal. I look forward to working with all of you!

Thom Cmar sent the email below this morning. [REDACTED]



[REDACTED]

Bob

Robert J. Lundman
Environment and Natural Resources Division
U.S. Department of Justice
Phone: 202-514-2496

From: Thomas Cmar <tcmar@[REDACTED]>
Sent: Monday, June 18, 2018 7:49 AM
To: Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>; Toth, Brian (ENRD) <BToth@ENRD.USDOJ.GOV>
Subject: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Dear Counsel:

I see that you recently appeared on behalf of EPA in the above-captioned matter. I am writing on behalf of the Appellants to confer concerning a procedural motion that we intend to make by this Wednesday, June 20.

We intend to request that the Court sever and hold in abeyance the issue in our appeal of the district court's denial of leave to amend and supplement our complaint to assert new claims challenging EPA's September 2017 rule delaying certain Effluent Limitation Guidelines compliance deadlines by two years (the "Delay Rule"). Our reason for seeking the abeyance is that, as you likely know, we are currently briefing the merits of the same claims in *Clean Water Action v. U.S. Environmental Protection Agency*, Case No. 18-60079 (5th Cir.).

We believe that holding our appeal of the jurisdiction issue in abeyance is appropriate pending the outcome of the Fifth Circuit proceeding is appropriate because, notwithstanding the district court's decision, the issue of whether district or appeals courts have original jurisdiction over the Delay Rule has not been finally resolved. For example, it is possible that the Fifth Circuit will, *sua sponte*, consider whether it has jurisdiction to review the Delay Rule and conclude that it does not, ruling instead that challenges to the Delay Rule must proceed in district courts. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction") (internal quotation marks and citation omitted). In addition, at least one other party is challenging the Delay Rule in district court; in that case, pending in the District of Arizona, there are pending motions concerning this same jurisdictional issue. *See Center for Biological Diversity v. Pruitt*, Case No. 4:18-cv-00050-TUC-JAS. However, if the Fifth Circuit issues a decision on the merits of Appellants' Delay Rule claims, that would likely obviate the need for any further proceedings in the D.C. Circuit concerning those claims.

Please note that we are seeking an abeyance of their appeal of the district court's holding on their Delay Rule claims only. We are also appealing the district court's holding that our claims challenging EPA's April 2017 administrative stay of the ELG rule are moot. We will request that the Court set a briefing schedule on that issue.

Could you let me know if EPA will take a position on our motion to sever and hold in abeyance our appeal on the Delay Rule claims? The favor of your reply by Wednesday at 12:00 Eastern would be much appreciated.

Please feel free to give me a call on my cell if you would like to discuss this matter by phone.

Thanks,

Thom Cmar

Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301
[REDACTED]

The information contained in this email message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments.

*please consider the environment before printing

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 9/14/2018 7:38:14 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: Re: Follow-up on steam electric postponement rule brief

Thanks, Tuski. And good catch, [REDACTED]
standards.

[REDACTED]

Otherwise, these edits look good and responsive to David's feedback.

Thanks so much,
Jessica

From: Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Sent: Friday, September 14, 2018 3:12 PM
To: Zomer, Jessica
Subject: RE: Follow-up on steam electric postponement rule brief

Jessica, here is a redline reflecting some changes in response to David's comments. As I mentioned on our call earlier,

[REDACTED]
incorporated comments from Chris Pugh and Jon D'Amico.

One additional issue you'll see reflected in the redline: [REDACTED]
[REDACTED]

I'm still waiting for Jeff Wood's comments, and I'll let you know if anything substantive comes up.

From: Zomer, Jessica <Zomer.Jessica@epa.gov>
Sent: Friday, September 14, 2018 11:11 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: Re: Follow-up on steam electric postponement rule brief

Yes, I saw you tried to call. I am on a call to prepare for an upcoming briefing on the steam rulemaking. I can call you when I'm done...hopefully 11:45?

From: Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Sent: Friday, September 14, 2018 11:09 AM

To: Zomer, Jessica

Subject: RE: Follow-up on steam electric postponement rule brief

Jessica, I just tried to call you to discuss but got your voicemail. Want to give me a call when you get a chance?

From: Zomer, Jessica <Zomer.Jessica@epa.gov>

Sent: Friday, September 14, 2018 11:00 AM

To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>

Subject: Re: Follow-up on steam electric postponement rule brief

Yes, these are the only comments from David. No attachment with additional edits.

Have you had a chance to think about some of these suggestions? Any thoughts?

From: Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>

Sent: Thursday, September 13, 2018 11:38 PM

To: Zomer, Jessica

Subject: RE: Follow-up on steam electric postponement rule brief

Jessica, can you confirm that the only comments from David are those that he included in the text of the email? I didn't see a Word attachment with further comments (the only attachment I got was the AG memo). Just want to make sure there isn't anything I'm missing.

From: Hoshijima, Tsuki (ENRD)

Sent: Thursday, September 13, 2018 10:35 PM

To: Zomer, Jessica <Zomer.Jessica@epa.gov>

Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>

Subject: Re: Follow-up on steam electric postponement rule brief

Thanks Jessica! I'll also think through them tomorrow morning and we can discuss if necessary.

On Sep 13, 2018, at 9:40 PM, Zomer, Jessica <Zomer.Jessica@epa.gov> wrote:

Tsuki, Jessica - FYI, comments from David just came in. I need to take a closer look tomorrow but wanted to pass them along ASAP.

Begin forwarded message:

From: "Fotouhi, David" <Fotouhi.David@epa.gov>

To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>

Cc: "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>, "Levine, MaryEllen" <levine.maryellen@epa.gov>, "Mills, Derek" <Mills.Derek@epa.gov>

Subject: RE: Follow-up on steam electric postponement rule brief

This looks good. A few comments:


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-

-

-

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976 
fotouhi.david@epa.gov

From: Zomer, Jessica



Sent: Thursday, September 6, 2018 3:28 PM


To: Fotouhi, David <Fotouhi.David@epa.gov>

Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen
<levine.maryellen@epa.gov>; Mills, Derek <Mills.Derek@epa.gov>

Subject: Follow-up on steam electric postponement rule brief

David,

You'll see that I routed our draft steam electric postponement rule brief to you for your review in CTS today (attached here, as well). Following up on your comments from reg review, I checked with DOJ, and 




whether or how these cases should be addressed, please let me know.

Thanks,

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

From: Hoshijima, Tsuki (ENRD) [<mailto:Tsuki.Hoshijima@usdoj.gov>]

Sent: Thursday, September 06, 2018 11:21 AM

To: Zomer, Jessica <Zomer.Jessica@epa.gov>

Subject: RE: Comments on brief?



<APPELLATE-#368494-v1-Guidance_Regarding_Nationwide_Injunctions.pdf>

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 9/14/2018 3:10:59 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: Re: Follow-up on steam electric postponement rule brief

Yes, I saw you tried to call. I am on a call to prepare for an upcoming briefing on the steam rulemaking. I can call you when I'm done...hopefully 11:45?

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Sent: Friday, September 14, 2018 11:09 AM
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Subject: RE: Follow-up on steam electric postponement rule brief

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Subject: Re: Follow-up on steam electric postponement rule brief

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Thanks Jessica! I'll also think through them tomorrow morning and we can discuss if necessary.

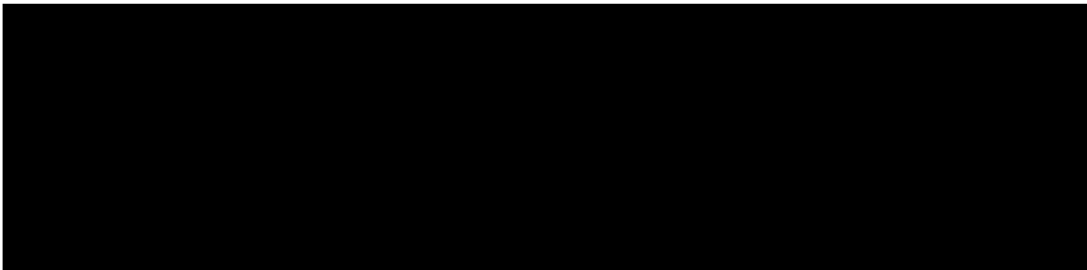
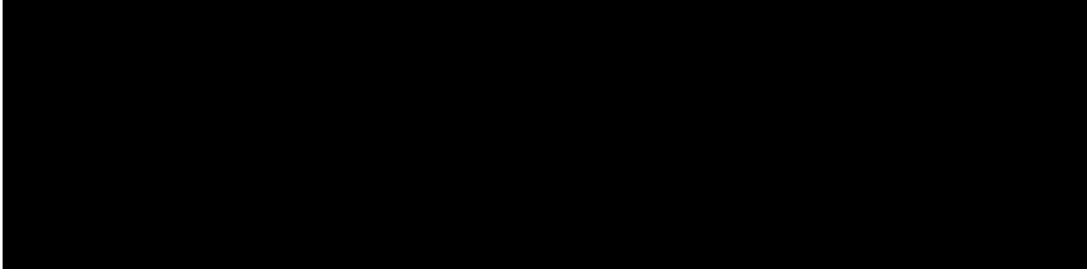
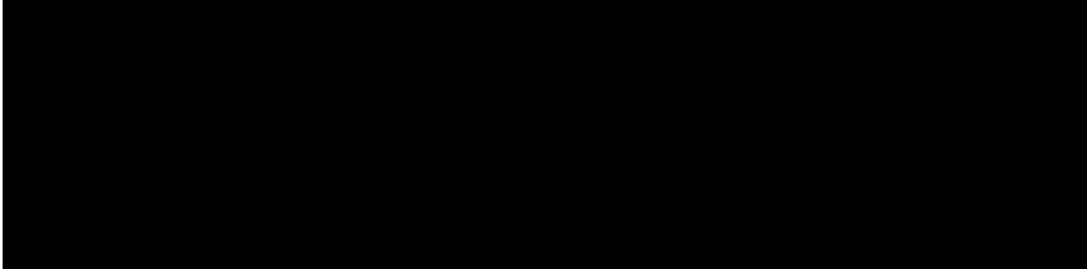
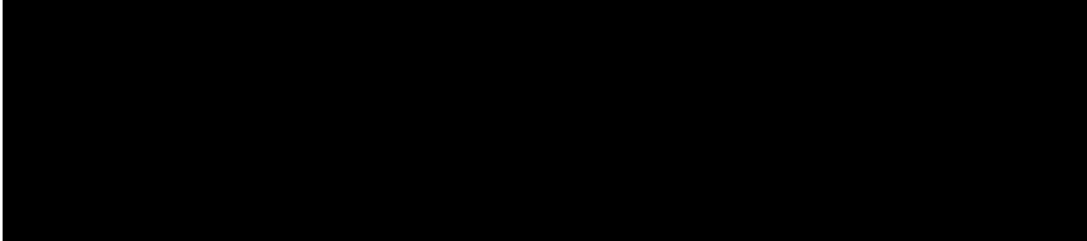
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Subject: RE: Follow-up on steam electric postponement rule brief

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- 

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976 
fotouhi.david@epa.gov

From: Zomer, Jessica
Sent: Thursday, September 6, 2018 3:28 PM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Mills, Derek <Mills.Derek@epa.gov>
Subject: Follow-up on steam electric postponement rule brief

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[REDACTED]

whether or how these cases should be addressed, please let me know.

Thanks,

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1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
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Sent: Thursday, September 06, 2018 11:21 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Comments on brief?

[REDACTED]

<APPELLATE-#368494-v1-Guidance_Regarding_Nationwide_Injunctions.pdf>

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 9/14/2018 3:00:06 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: Re: Follow-up on steam electric postponement rule brief

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Office of General Counsel
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Tel: +1 202.564.1976 
fotouhi.david@epa.gov

From: Zomer, Jessica


Sent: Thursday, September 6, 2018 3:28 PM

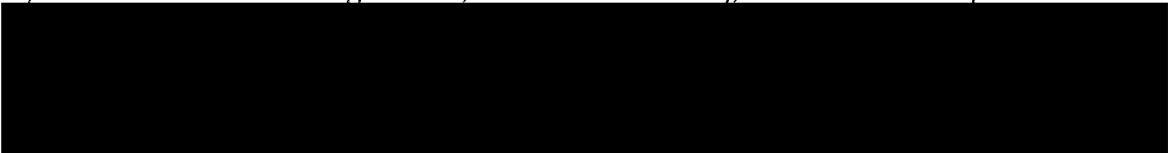
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From: Hoshijima, Tsuki (ENRD) [<mailto:Tsuki.Hoshijima@usdoj.gov>]
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To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Comments on brief?



<APPELLATE-#368494-v1-Guidance_Regarding_Nationwide_Injunctions.pdf>

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 2/1/2018 9:14:34 PM
To: jessannehall@[REDACTED]
Subject: Fwd: 17-1216 Clean Water Action, et al v. E. Pruitt, et al "Letter Sent (Court)" (EPA-82FR43494)
Attachments: Letter transferring case to Fifth Circuit.pdf; ATT00001.htm

Sent from my iPhone

Begin forwarded message:

From: "Hoshijima, Tsuki (ENRD)" <Tsuki.Hoshijima@usdoj.gov>
Date: February 1, 2018 at 3:22:12 PM EST
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>
Cc: "O'Donnell, Jessica (ENRD)" <Jessica.O'Donnell@usdoj.gov>
Subject: FW: 17-1216 Clean Water Action, et al v. E. Pruitt, et al "Letter Sent (Court)" (EPA-82FR43494)

To follow up on the prior point, the subsequent docket entry makes it clear that the Court is transferring the case with the petitioners' (not plaintiffs, as I mistakenly said in the prior email) motion for abeyance still pending.

From: ecfnoticing@cadc.uscourts.gov [mailto:ecfnoticing@cadc.uscourts.gov]
Sent: Thursday, February 01, 2018 3:18 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: 17-1216 Clean Water Action, et al v. E. Pruitt, et al "Letter Sent (Court)" (EPA-82FR43494)

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

United States Court of Appeals for District of Columbia Circuit

Notice of Docket Activity

The following transaction was entered on 02/01/2018 at 3:06:28 PM EST and filed on 02/01/2018

Case Name: Clean Water Action, et al v. E. Pruitt, et al
Case Number: 17-1216
Document(s): Document(s)

Docket Text:

LETTER [1716068] sent transferring case to the United States Court of Appeals for the Fifth Circuit. Documents Sent: Clerk's File (Electronic), a copy of order transferring case, and the pending motion to hold case in abeyance. [17-1216]

Notice will be electronically mailed to:

Kristy A. Niehaus Bulleit, Counsel: [kbulleit@\[REDACTED\]](mailto:kbulleit@[REDACTED]) [bpotte@\[REDACTED\]](mailto:bpotte@[REDACTED])
 Mr. Thomas Joseph Cmar: [tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED]), [fchampenois@\[REDACTED\]](mailto:fchampenois@[REDACTED])
[gwinick@\[REDACTED\]](mailto:gwinick@[REDACTED])
 Patton Dycus: [pdycus@\[REDACTED\]](mailto:pdycus@[REDACTED])
 Fifth Circuit Clerk: Peggy_Keller@ca5.uscourts.gov
 Matthew Gerhart: [megerhart@\[REDACTED\]](mailto:megerhart@[REDACTED]), [fchampenois@\[REDACTED\]](mailto:fchampenois@[REDACTED])
 Tsuki Hoshijima: tsuki.hoshijima@usdoj.gov, efile_eds.enrd@usdoj.gov
 Mr. Harry Margerum Johnson, III: [pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED]), [sterrell@\[REDACTED\]](mailto:sterrell@[REDACTED])
 Mr. Martin F. McDermott: martin.mcdermott@usdoj.gov, EFILE_EDS.ENRD@USDOJ.GOV
 Mr. Timothy Louis McHugh: [tmchugh@\[REDACTED\]](mailto:tmchugh@[REDACTED])
 Casey Roberts: [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]), [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED])
[kathleen.krust@\[REDACTED\]](mailto:kathleen.krust@[REDACTED]), [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])
 Joshua Douglas Smith, Attorney: [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]), [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])

The following document(s) are associated with this transaction:

Document Description: Letter Sent

Original Filename:

/opt/ACECF/live/forms/RobertCavello_171216_1716068_F_TmsfrCoverLettertoClerk-ECF_410.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1109186823 [Date=02/01/2018] [FileNumber=1716068-3]
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 5e241c634a9c2e2ac98f3b839c6980aeb7da673f85ad9d1]]

Recipients:

- [Kristy A. Niehaus Bulleit, Counsel](#)
- [Mr. Thomas Joseph Cmar](#)
- [Patton Dycus](#)
- [Fifth Circuit Clerk](#)
- [Matthew Gerhart](#)
- [Tsuki Hoshijima](#)
- [Mr. Harry Margerum Johnson, III](#)
- [Mr. Martin F. McDermott](#)
- [Mr. Timothy Louis McHugh](#)
- [Casey Roberts](#)
- [Joshua Douglas Smith, Attorney](#)

Document Description: Order Transferring Case

Original Filename: /opt/ACECF/live/forms/17-1216LDSD.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1109186823 [Date=02/01/2018] [FileNumber=1716068-0]
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 7558c92821ab17da5a2717443dfc608cf7f7fed9b738fd0d]]

Recipients:

- Kristy A. Niehaus Bulleit, Counsel
- Mr. Thomas Joseph Cmar
- Patton Dycus
- Fifth Circuit Clerk
- Matthew Gerhart
- Tsuki Hoshijima
- Mr. Harry Margerum Johnson, III
- Mr. Martin F. McDermott
- Mr. Timothy Louis McHugh
- Casey Roberts
- Joshua Douglas Smith, Attorney

Document Description: Docket Sheet**Original Filename:** /opt/ACECF/live/forms/17-1216 Docketpdf.pdf**Electronic Document Stamp:**

[STAMP acecfStamp_ID=1109186823 [Date=02/01/2018] [FileNumber=1716068-1]
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- Mr. Harry Margerum Johnson, III
- Mr. Martin F. McDermott
- Mr. Timothy Louis McHugh
- Casey Roberts
- Joshua Douglas Smith, Attorney

Document Description: Motion to HIA (Pending)**Original Filename:** /opt/ACECF/live/forms/Motion to Hold in Abeyance.pdf**Electronic Document Stamp:**

[STAMP acecfStamp_ID=1109186823 [Date=02/01/2018] [FileNumber=1716068-2]
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c97e2eb3647e1e178156a28a883cd0719971accc446b46b4]]

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- Tsuki Hoshijima
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- Mr. Martin F. McDermott
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Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 1/31/2018 5:44:24 PM
To: Floom, Kristen (ENRD) [Kristen.Floom@usdoj.gov]
Subject: RE: ELG rule case filed by CBD

Thanks, Kristen. And, thank you for taking this new lawsuit on, Travis!

From: Floom, Kristen (ENRD) [mailto:Kristen.Floom@usdoj.gov]
Sent: Wednesday, January 31, 2018 12:43 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Annatoyn, Travis (ENRD) <Travis.Annatoyn@usdoj.gov>
Subject: ELG rule case filed by CBD

Jessica:



Regards,
Kristen

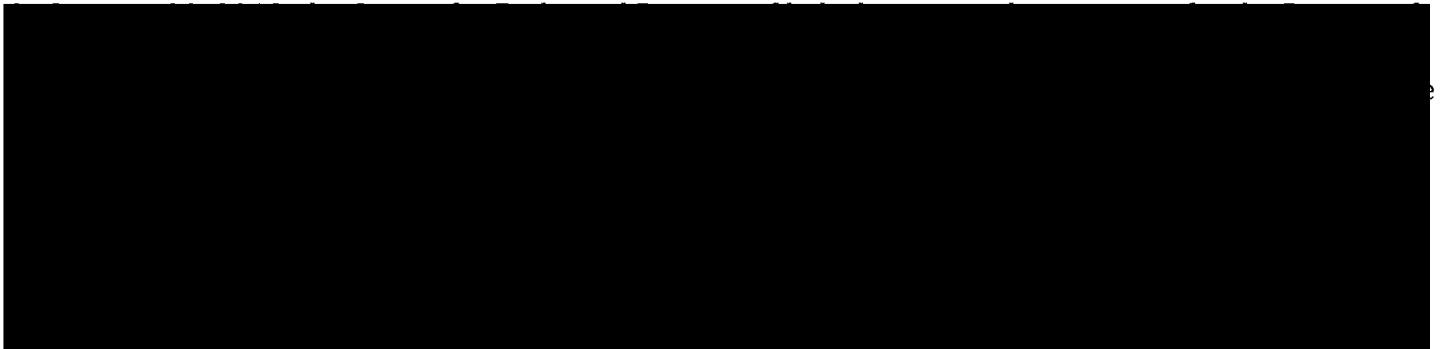
Kristen Byrnes Floom
Senior Trial Attorney
U.S. Dept. of Justice, ENRD
Wildlife and Marine Resources Section
601 D St., N.W.
Washington, DC 20004
202-305-0340

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 1/31/2018 8:21:32 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]; O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: FW: NEW LITIGATION (CWA/ESA/NEPA): CENTER FOR BIOLOGICAL DIVERSITY V. EPA, NO. 18-cv-0050 (D. Ariz.)
Attachments: CBD Complaint Challenging Steam Postponement Rule.pdf; NOI from CBD.PDF

FYI, new lawsuit filed over the postponement rule. My understanding is that Travis Annatoyn rather than Kristen Floom will be handling this new litigation for us on behalf of DOJ.

From: Zomer, Jessica
Sent: Wednesday, January 31, 2018 2:37 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Ross, David P <ross.davidp@epa.gov>; Nagle, Deborah <Nagle.Deborah@epa.gov>; Sawyers, Andrew <Sawyers.Andrew@epa.gov>; Wood, Robert <Wood.Robert@epa.gov>; Zobrist, Marcus <Zobrist.Marcus@epa.gov>; Matuszko, Jan <Matuszko.Jan@epa.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>; Ramach, Sean <Ramach.Sean@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Marshall, Tom <marshall.tom@epa.gov>; Pritts, Jesse <Pritts.Jesse@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: NEW LITIGATION (CWA/ESA/NEPA): CENTER FOR BIOLOGICAL DIVERSITY V. EPA, NO. 18-cv-0050 (D. Ariz.)



Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 6/8/2018 2:47:13 PM
To: jessannehall@[REDACTED]
Subject: Fwd: Draft Steam Briefing with MEL's and JZ's edits
Attachments: 2018_06_07_Steam Electric ELG Option Selection DRAFT (002) me 2l_JHZ.pptx; ATT00001.htm

Sent from my iPhone

Begin forwarded message:

From: "Levine, MaryEllen" <levine.maryellen@epa.gov>
Date: June 8, 2018 at 10:35:31 AM EDT
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>
Cc: "Witt, Richard" <Witt.Richard@epa.gov>
Subject: RE: Draft Steam Briefing with MEL's and JZ's edits

I made a couple of additional edits; please send to Richard, Ron, Jan and Rob. Cc Steve Richard and me. Thank you for getting us this far before your short maternity leave. I will miss you . . .

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345

From: Zomer, Jessica
Sent: Friday, June 08, 2018 9:35 AM
To: Levine, MaryEllen <levine.maryellen@epa.gov>
Cc: Witt, Richard <Witt.Richard@epa.gov>
Subject: Draft Steam Briefing with MEL's and JZ's edits

Mary Ellen,

Here are my edits on top of yours. Please review and see if you have any feedback on them. Also, I noticed a comment bubble that you created on slide 9 that is empty; I'm not sure if you intended to make a comment there or not.

Jessica

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 6/7/2018 9:36:46 PM
To: jessannehall@[REDACTED]
Subject: Fwd: Steam briefing
Attachments: 2018_06_07_Steam Electric ELG Option Selection DRAFT (002) mel.PPTX; ATT00001.htm

Sent from my iPhone

Begin forwarded message:

From: "Levine, MaryEllen" <levine.maryellen@epa.gov>
Date: June 7, 2018 at 4:48:25 PM EDT
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "Witt, Richard" <Witt.Richard@epa.gov>
Subject: FW: Steam briefing

Here are my comments. Ron called and said c [REDACTED] Deliberative Process / Ex. 5 account.

- Mary Ellen

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-1345

-----Original Message-----

From: Benware, Richard
Sent: Thursday, June 07, 2018 2:22 PM
To: Levine, MaryEllen <levine.maryellen@epa.gov>; Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Matuszko, Jan <Matuszko.Jan@epa.gov>
Subject: RE: Steam briefing

Here's the draft briefing. I'll see you guys at 3pm. Just let me know where.

-----Original Message-----

From: Matuszko, Jan
Sent: Wednesday, June 06, 2018 6:06 PM
To: Levine, MaryEllen <levine.maryellen@epa.gov>; Witt, Richard <Witt.Richard@epa.gov>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Benware, Richard <Benware.Richard@epa.gov>
Subject: Steam briefing

We have a draft steam briefing for options selection on 6/20. The approach has been blessed through OST. I am booked tomorrow starting at 9am, off Friday, and out if the office Monday as my youngest is graduating from high school. So, I asked Richard to get together with you guys to

explain our thinking and to pass it on to you and the rest of the core team for review. We have some clean-up, wordsmithing, etc of our own to do but it is in good enough shape to pass on to you. We will walk through the briefing on Tuesday with the edited version.

Any questions, give me a call tomorrow before 9 or better yet, your best bet is probably to call Richard as he has the pen.

Sent from my iPhone

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 4/27/2018 7:45:48 PM
To: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
CC: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]; Witt, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fbcc13f5878c4ef4b7b880de0221b9f9-RWITT]
Subject: Re: Steam Petitioners' proposed schedule in 5th circuit protective petition case (challenging steam postponement rule)

I need to confirm that MEL will be in the office on Monday. Can we say 3pm tentatively?

On Apr 27, 2018, at 3:40 PM, O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov> wrote:

Jessica – we'd like to set something up to discuss the 5th Circuit proceedings with you and MEL. Would either 11 am or 3pm on Monday work? We're somewhat flexible that day so suggest an alternative time if either of those doesn't work.

Thanks!

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

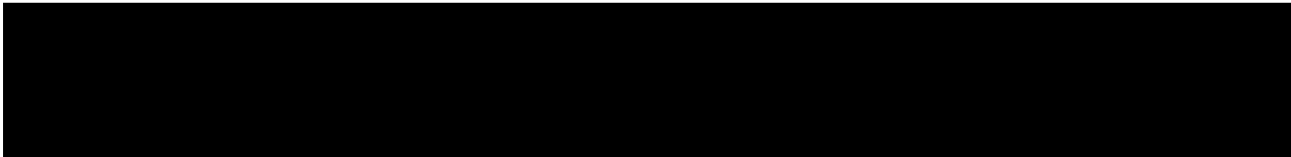
From: Zomer, Jessica <Zomer.Jessica@epa.gov>
Sent: Thursday, April 26, 2018 10:32 AM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Witt, Richard <Witt.Richard@epa.gov>
Subject: RE: Steam Petitioners' proposed schedule in 5th circuit protective petition case (challenging steam postponement rule)

Great, thanks for coordinating. Makes sense: please let me know the results of internal discussions. Perhaps we can set up a call for early next week when MEL is back?

From: O'Donnell, Jessica (ENRD) [mailto:Jessica.O'Donnell@usdoj.gov]
Sent: Thursday, April 26, 2018 10:02 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>; McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>; Witt, Richard <Witt.Richard@epa.gov>
Subject: RE: Steam Petitioners' proposed schedule in 5th circuit protective petition case (challenging steam postponement rule)

Jessica –





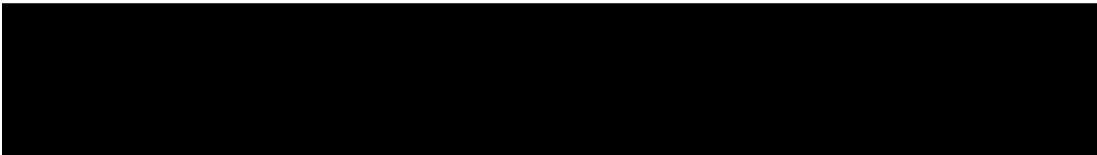
Thanks,
Jessica

From: Zomer, Jessica [<mailto:Zomer.Jessica@epa.gov>]
Sent: Thursday, April 26, 2018 9:12 AM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Witt, Richard <Witt.Richard@epa.gov>
Subject: Re: Steam Petitioners' proposed schedule in 5th circuit protective petition case (challenging steam postponement rule)

Totally understand. That's why I want to check on MEL's schedule because she will probably be most critical.

Sent from my iPhone

On Apr 26, 2018, at 7:59 AM, O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov> wrote:



From: Zomer, Jessica [<mailto:Zomer.Jessica@epa.gov>]
Sent: Thursday, April 26, 2018 7:44 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Witt, Richard <Witt.Richard@epa.gov>
Subject: Re: Steam Petitioners' proposed schedule in 5th circuit protective petition case (challenging steam postponement rule)

Can I get back to you after conferring with Mary Ellen on Monday?

On Apr 25, 2018, at 5:23 PM, Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov> wrote:

Thanks Jessica. Based on your and Richard's schedule, how far after



From: Zomer, Jessica <Zomer.Jessica@epa.gov>
Sent: Wednesday, April 25, 2018 2:46 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>

Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>;
McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Witt,
Richard <Witt.Richard@epa.gov>; Eitel, Michael (ENRD)
<MEitel@ENRD.USDOJ.GOV>

Subject: Re: Steam Petitioners' proposed schedule in 5th circuit
protective petition case (challenging steam postponement rule)

I am definitely in favor of getting more time for our brief since I don't anticipate getting back from maternity leave until after Labor Day. I also need to check on Mary Ellen's summer schedule, but she is on leave until this Monday. Richard is filling in for me on all things steam electric related while I'm out, and he will already be busy helping draft a notice of proposed rule over the summer in our steam reconsideration rulemaking.

[REDACTED]

On Apr 25, 2018, at 1:56 PM, Hoshijima, Tsuki (ENRD)
<Tsuki.Hoshijima@usdoj.gov> wrote:

Hi Jessica, the Petitioners reached out to propose the
following schedule. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section

202-514-3468

tsuki.hoshijima@usdoj.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 2/20/2018 1:53:57 PM
To: Tsuki.Hoshijima@usdoj.gov; Jessica.O'Donnell@usdoj.gov
CC: martin.mcdermott@usdoj.gov
Subject: draft motion to transfer DC Cir protective petition case (705 Action)
Attachments: CWA_II_motion_to_dismiss_or_alternatively_transfe..._JHZ.DOC; ATT00001.htm

I had a few edits on the motion but that was it. We got the green light from our front office.

Thanks!

Jessica

Office of General Counsel

U.S. Environmental Protection Agency

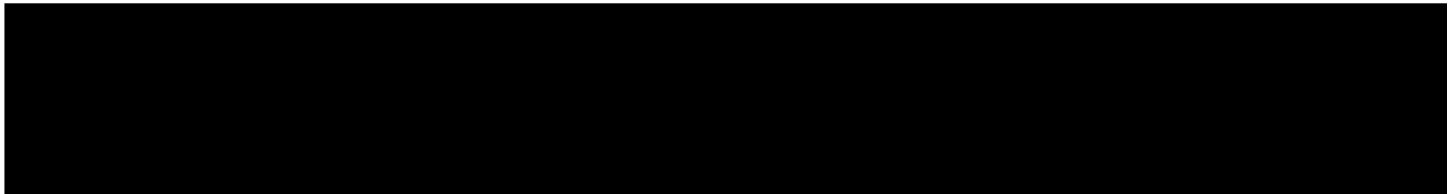
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460

Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 3/28/2018 11:37:12 AM
To: Michael.Eitel@usdoj.gov; Levine, MaryEllen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f59ef87b9924425897c750435bad5522-MLEVINE]; Tsuki.Hoshijima@usdoj.gov; martin.mcdermott@usdoj.gov; Jessica.O'Donnell@usdoj.gov; Wade, Alexis [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5c9fba2ef8444572a39185242b70593b-Wade, Alexis]
Subject: Draft ESA/Steam Brief
Attachments: DENVER-#607287-v1-ELG_-_Review_Draft_MTD_JHZ.DOCX; ATT00001.htm

Thanks, Mike. Here is the draft with my edits and comments. There are still a couple of people in my office who plan to review this today (Mary Ellen and Alexis), including my manager (Mary Ellen) who may have some edits to make to my own edits, so Mike please hold off on accepting any changes until I send you another draft with all of our comments later today. But, I wanted you to see some of the edits I have made so far.



Jessica Z.

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 3/23/2018 1:23:49 PM
To: Tsuki.Hoshijima@usdoj.gov
Subject: Today's filing
Attachments: CWA_IV_opp_to_renewed_motion_for_abeyanceJHZmel.docx; ATT00001.htm

Tsuki,

Although our Front Office didn't have any comments on the opposition to petitioners' motion for abeyance, I just realized I may not have sent you the few minor edits that Mary Ellen and I had on the brief. Sorry for the late email on this!

Jessica

Begin forwarded message:

From: "Zomer, Jessica" <Zomer.Jessica@epa.gov>
Date: March 20, 2018 at 4:04:52 PM EDT
To: "Fotouhi, David" <fotouhi.david@epa.gov>
Cc: "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>, "Levine, MaryEllen" <levine.maryellen@epa.gov>, "Mills, Derek" <Mills.Derek@epa.gov>
Subject: Two Steam Electric Litigation Filings for Review

David,

Today I sent you two steam electric litigation draft filings for review through CTS. Since this is the first time we're using CTS for steam electric-related document reviews, I thought I'd also send these filings to you in an email to make sure you have no trouble accessing them.

The first draft filing is our response to the D.D.C.'s 3/12 minute order requesting further briefing related to plaintiffs' pending motion to amend their complaint. The filing deadline for this is Thursday, 3/22.

The second draft filing is our opposition to petitioners' motion to hold the case in abeyance in the Fifth Circuit postponement rule litigation. The filing deadline for this is Friday, 3/23. I've also attached petitioners' motion for abeyance for your convenience.

Thanks for your review,

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 12/11/2017 1:17:01 PM
To: Jessica.O'Donnell@usdoj.gov
Subject: Fwd: From our comment response document..relevant to our conversation and MEL's Suggestion regarding leachate
Attachments: From comment responses 20a.docx; ATT00001.htm

Good for you to see this too. Only one page

Sent from my iPhone

Begin forwarded message:

From: Rich and Jan Matuszko <randj.mat@[REDACTED]>
Date: December 11, 2017 at 7:45:38 AM EST
To: <Jordan.Ronald@epamail.epa.gov>, <zomer.jessica@epa.gov>, <levine.maryellen@epa.gov>
Cc: Jan Matuszko <Matuszko.Jan@epa.gov>
Subject: From our comment response document..relevant to our conversation and MEL's Suggestion regarding leachate


Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 12/20/2018 7:52:00 PM
To: Martin.McDermott@usdoj.gov
Subject: Fwd: Status report due Dec 31 in steam litigation
Attachments: ENV_DEFENSE-#854157-v1-SWEPCO_OCTOBER_STATUS_REPORT_revised for Dec.docx; ATT00001.htm

Here is the revised status report. Clients are okay with it, as is the OGC front office.

Begin forwarded message:

From: "Zomer, Jessica" <Zomer.Jessica@epa.gov>
Date: December 19, 2018 at 9:24:02 AM EST
To: "Benware, Richard" <Benware.Richard@epa.gov>, "Matuszko, Jan" <Matuszko.Jan@epa.gov>
Subject: Status report due Dec 31 in steam litigation

We have a 90-day status report due on December 31 in the Fifth Circuit 2015 rule litigation. Can you take a look at the attached draft that I've revised from the October status report and let me know if you have any edits? 



Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 2/13/2018 9:48:07 PM
To: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
CC: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: Re: tomorrow's status conference in 705/steam case

Ok, I will plan for that.

Sent from my iPhone

On Feb 13, 2018, at 4:45 PM, O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov> wrote:

You can just show up in the lobby with an ID. They will have your name and will call up to our floor to let us know you are here. My assistant Nikole or someone else will come down to escort you up to the 8th Floor. If not too much trouble, it probably makes sense for you to get here early – say 12:30.

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

From: Zomer, Jessica [<mailto:Zomer.Jessica@epa.gov>]
Sent: Tuesday, February 13, 2018 4:28 PM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: tomorrow's status conference in 705/steam case

Only I am planning to join you for the telephonic status conference tomorrow. I'm not sure what information you need from me other than my name, so let me know if you need something else. Also please let me know where I should meet you – I haven't been over to your building in a long time.

Thanks!

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 2/13/2018 4:41:38 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Subject: Draft Supp Opp
Attachments: ENV_DEFENSE-#835208-v3-CWA_IV_supp_opp_to_abeyance_JHZ.DOCX

This has been reviewed through David F. I had a few minor edits, but that was it. Thanks!

Jessica

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, February 12, 2018 7:57 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>
Subject: RE: Draft Notice of Supplemental Authority in Steam Electric DDC 705 Case

Hi Jessica, here is a draft supplemental opposition to abeyance in the Fifth Circuit [REDACTED]

[REDACTED]

[REDACTED]

Thanks,
Tsuki

From: O'Donnell, Jessica (ENRD)
Sent: Friday, February 09, 2018 6:40 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Draft Notice of Supplemental Authority in Steam Electric DDC 705 Case

The plaintiffs just filed the attached response to UWAG's notice of supplemental authority, before I could file our [REDACTED]

From: Hoshijima, Tsuki (ENRD)
Sent: Friday, February 9, 2018 5:27 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Subject: RE: Draft Notice of Supplemental Authority in Steam Electric DDC 705 Case

[REDACTED]

From: Hoshijima, Tsuki (ENRD)
Sent: Friday, February 09, 2018 4:35 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Subject: RE: Draft Notice of Supplemental Authority in Steam Electric DDC 705 Case

Thanks Jessica!

From: Zomer, Jessica [<mailto:Zomer.Jessica@epa.gov>]
Sent: Friday, February 09, 2018 4:30 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Subject: Draft Notice of Supplemental Authority in Steam Electric DDC 705 Case

Tsuki,

I just have a few minor edits on this (attached), and David thinks it looks good as is.

Thanks,
Jessica

From: Fotouhi, David
Sent: Friday, February 09, 2018 4:19 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Mills, Derek <Mills.Derek@epa.gov>
Subject: RE: Please Review: Draft Notice of Supplemental Authority in Steam Electric DDC 705 Case

Looks good; thank you.

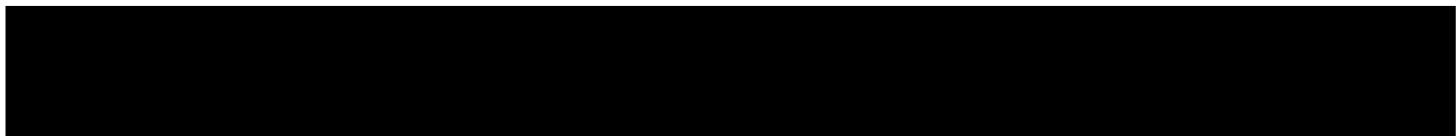
David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Zomer, Jessica
Sent: Friday, February 9, 2018 3:53 PM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Mills, Derek <Mills.Derek@epa.gov>
Subject: Please Review: Draft Notice of Supplemental Authority in Steam Electric DDC 705 Case
Importance: High

David,





Thanks,

Jessica Hall Zomer

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460

Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 2/13/2018 3:25:58 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: FW: Steam Electric Status Report
Attachments: SWEPCO Status Report 11-20-17.pdf

Tsuki,

[REDACTED]

[REDACTED]

Jessica

From: Zomer, Jessica
Sent: Tuesday, February 06, 2018 4:12 PM
To: Benware, Richard <Benware.Richard@epa.gov>; Ramach, Sean <Ramach.Sean@epa.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>
Subject: Steam Electric Status Report

Hi All,

[REDACTED]

Thanks,
Jessica

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 20, 2017 3:53 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>; O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>
Subject: RE: SWEPCO Draft Status Report

Here it is, as filed.

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Monday, November 20, 2017 9:09 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD)

<JODonnell@enrd.usdoj.gov>

Subject: Re: SWEPCO Draft Status Report

EPA is good with this as is. Thanks!

Jessica

On Nov 17, 2017, at 1:02 PM, Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov> wrote:

Hi all,

Here is a draft status report for SWEPCO, due on Monday 11/20. [REDACTED]

Please send me any comments by noon on Monday.

Thanks,

Tsuki

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

<ENV_DEFENSE-#826289-v1-SWEPCO_Status_Report_11-20-17.DOCX>

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/13/2017 5:12:21 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: Re: D.C. Cir. Case No. 17-1216 -- protective petition matter

Yes I agree, thanks!

Sent from my iPhone

On Nov 13, 2017, at 11:34 AM, Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov> wrote:

[REDACTED]
today. I'd like to give Thom a call this afternoon to discuss with him — can you let me know what you think? Thanks!

From: McDermott, Martin (ENRD)
Sent: Friday, November 10, 2017 3:21 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: FW: D.C. Cir. Case No. 17-1216 -- protective petition matter

FYI

From: Thomas Cmar [[mailto:tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED])]
Sent: Thursday, November 09, 2017 10:27 PM
To: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Subject: D.C. Cir. Case No. 17-1216 -- protective petition matter

Hi Martin and Jessica,

I'm writing concerning D.C. Circuit Case No. 17-1216 (*Clean Water Action, et al. v. Pruitt*), which is our protective petition filing concerning EPA's September 18, 2017 rule delaying certain steam electric ELG compliance deadlines. No attorney from DOJ has yet entered an appearance in the case on EPA's behalf, but I am reaching out to the two of you to see if you know if someone is planning to appear. We have a deadline on Monday to make our initial filings in the case, and we intend to make a motion to hold the case in abeyance similar to the motion that we made in our protective petition matter concerning the April 25, 2017 administrative stay of steam electric ELG rule deadlines (a copy of that motion is attached for reference). We would like to know whether EPA will take a position on our motion.

Please feel free to give me a call if you would like to discuss.

Best,

Thom

Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301
[REDACTED]

The information contained in this email message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments.

*please consider the environment before printing

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 2/28/2018 6:43:35 PM
To: Annatoyn, Travis (ENRD) [Travis.Annatoyn@usdoj.gov]
Subject: NOI
Attachments: NOI from CBD.PDF

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 12/14/2017 8:12:51 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: FW: FOR REVIEW: SWEPCO MERIT BRIEF
Attachments: DF edits to ENV_DEFENSE-#828509-v1-SWEPCO_DEC_12_2017_PM_DRAFT_MERITS_BR....docx

Martin,

Here is what I sent back to David to address his comments/edits, in case there is any confusion about what I think should be accepted of his edits.

Jessica

From: Zomer, Jessica
Sent: Thursday, December 14, 2017 3:13 PM
To: Fotouhi, David <fotouhi.david@epa.gov>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Wood, Robert <Wood.Robert@epa.gov>; Matuszko, Jan <Matuszko.Jan@epa.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>
Subject: RE: FOR REVIEW: SWEPCO MERIT BRIEF

David,

Attached are my responses to your comments and questions. If I didn't respond otherwise, it means I am taking the edit. Anytime that I am recommending that we don't accept your edit or if I'm proposing language to address your comment, I say so.

Let me know if you have any further questions.

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

From: Fotouhi, David
Sent: Wednesday, December 13, 2017 8:52 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Wood, Robert <Wood.Robert@epa.gov>; Matuszko, Jan <Matuszko.Jan@epa.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>
Subject: RE: FOR REVIEW: SWEPCO MERIT BRIEF

Please find my suggestions, comments, and questions tracked in the attached version of the draft. Thank you.

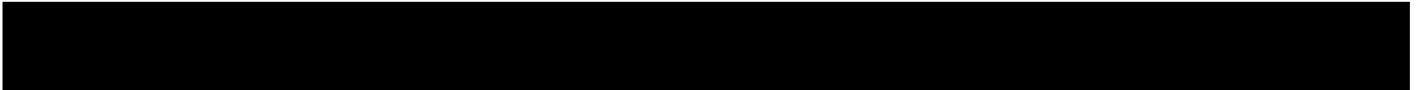
David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Zomer, Jessica
Sent: Monday, December 11, 2017 4:40 PM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Cc: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Wood, Robert <Wood.Robert@epa.gov>; Matuszko, Jan <Matuszko.Jan@epa.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>
Subject: FOR REVIEW: SWPCO MERIT BRIEF
Importance: High

David,

Attached for your review is EPA's draft opposition to Environmental Petitioners' Opening brief. I'm also attaching the Petitioners' Opening Brief for your reference. DOJ just sent this draft today to their Front Office as well.



My understanding is that OST is going to be sending this today to Mike, Lee and Sarah for their review too.

Thanks so much,

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/9/2017 9:28:32 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: RE: Steam Electric CADC Postponement Rule -- draft motion to transfer

Just FYI, we are working on compiling the certified index to the record and hope to have it to you for review next week.

Jessica

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 06, 2017 5:49 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>
Subject: Steam Electric CADC Postponement Rule -- draft motion to transfer

Hi Jessica,

Here is a draft motion to transfer for the Postponement Rule "protective petition." Could you return comments from your team and your front office by COB Wednesday?

Also, the certified index to the record is due 11/27/17. [REDACTED]

[REDACTED]

Thanks,
Tsuki

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 2/22/2018 6:37:46 PM
To: Annatoyn, Travis (ENRD) [Travis.Annatoyn@usdoj.gov]
Subject: RE: ELG rule case filed by CBD

I'm out of the office Monday, but can talk Tuesday. Also, I will forward you [REDACTED]

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

From: Annatoyn, Travis (ENRD) [mailto:Travis.Annatoyn@usdoj.gov]
Sent: Thursday, February 22, 2018 10:13 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: Re: ELG rule case filed by CBD

[REDACTED]
[REDACTED] Can we set up a to chat by phone next Monday? I'm around in the morning.

Sent from my iPhone

On Feb 22, 2018, at 8:05 AM, Zomer, Jessica <Zomer.Jessica@epa.gov> wrote:

So when is our answer/MTD due? And do we need an extension?

From: Annatoyn, Travis (ENRD) [mailto:Travis.Annatoyn@usdoj.gov]
Sent: Thursday, February 22, 2018 10:04 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: Re: ELG rule case filed by CBD

We do: Feb. 2.

Sent from my iPhone

On Feb 22, 2018, at 12:22 AM, Zomer, Jessica <Zomer.Jessica@epa.gov> wrote:

Hi Travis,

Do we have a date of service yet?

Thanks,
Jessica

Sent from my iPhone

On Jan 31, 2018, at 1:20 PM, Annatoyn, Travis (ENRD) <Travis.Annatoyn@usdoj.gov> wrote:

Hi Jessica—nice to meet you.

At the earliest, an MTD would be due 60 days from service on the AUSA, but I don't think we have a date of service yet.

Travis Annatoyn, Trial Attorney
United States Department of Justice
Environment and Natural Resources Division

601 D St. NW
Washington, D.C. 20004
travis.annatoyn@usdoj.gov
Tel: 202-514-5243
Fax: 202-305-0275

From: Zomer, Jessica [<mailto:Zomer.Jessica@epa.gov>]
Sent: Wednesday, January 31, 2018 1:17 PM
To: Floom, Kristen (ENRD) <KFloom@ENRD.USDOJ.GOV>
Cc: Annatoyn, Travis (ENRD) <TAnnatoyn@ENRD.USDOJ.GOV>
Subject: RE: ELG rule case filed by CBD

Okay, thanks! When would the motion to dismiss be due in this case?

From: Floom, Kristen (ENRD) [<mailto:Kristen.Floom@usdoj.gov>]
Sent: Wednesday, January 31, 2018 12:43 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Annatoyn, Travis (ENRD) <Travis.Annatoyn@usdoj.gov>
Subject: ELG rule case filed by CBD

Jessica:

CBD has filed its lawsuit challenging the postponement of the ELG rule compliance deadlines. I've attached their complaint, filed yesterday in the District of Arizona.

Because the timing of a motion to dismiss in the new CBD case would conflict with the deadlines in two of my other cases, my managers have reassigned this matter to Travis Annatoyn, another attorney in my office. Travis is tied up this week working on a brief in another case, but he will reach out to you soon.

Regards,
Kristen

Kristen Byrnes Floom

Senior Trial Attorney
U.S. Dept. of Justice, ENRD
Wildlife and Marine Resources Section
601 D St., N.W.
Washington, DC 20004
202-305-0340

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 12/27/2017 3:10:34 PM
To: jessannehall@[REDACTED]
Subject: Fwd: Briefing Paper
Attachments: steve comments on Briefing for Matt Leopold on Steam Electric Rulemaking and Litigation January 2018_JHZ.docx; ATT00001.htm

Sent from my iPhone

Begin forwarded message:

From: "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>
Date: December 27, 2017 at 10:07:21 AM EST
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>
Subject: RE: Briefing Paper

Looks good. A few minor comments on text edits. When I display without any markups it just fits in four pages, which I'm limiting us to with of our all papers so please try to stay to that in your final version.

Thanks.

Steve Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
202 (564-5488)

From: Zomer, Jessica
Sent: Wednesday, December 27, 2017 9:51 AM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Subject: Briefing Paper

It looks good; much better organized. Here's my markup. I am prepared to proofread carefully when you send it back.

Jessica

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 12/4/2017 5:12:24 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: RE: Draft Steam Brief with Steve's comments
Attachments: ENV_DEFENSE-#827067-v1-SWEPCO_NOV_22_2017_DRAFT_BRIEF_Steve's comments.docx

If it wasn't before, here it is.

From: McDermott, Martin (ENRD) [mailto:Martin.McDermott@usdoj.gov]
Sent: Monday, December 04, 2017 12:10 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Draft Steam Brief with Steve's comments

Is it attached?

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Friday, December 01, 2017 4:47 PM
To: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
Cc: Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: Draft Steam Brief with Steve's comments
Importance: High

Martin,

Steve had only very minor comments on the brief, which are reflected in this draft. Once you've had a chance to clean it up, let me know so I can send it to my clients at the same time you send it to Jessica O'Donnell for her review. After she's reviewed it, I would like to send it to David.

Thanks,

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/9/2017 4:40:07 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: Legacy and Leachate Sections as Revised
Attachments: Legacy Argument Revised Nov 9 Martin&Jessica.docx; Leachate Argument Revised Nov 9 (Martin&Jessica).docx

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/16/2017 8:41:58 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: RE: Information for status report
Attachments: ENV_DEFENSE-#826289-v1-Status_Report_11-20-17JHZ.DOCX

Here are responses to your questions/comments.

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Thursday, November 16, 2017 1:46 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Information for status report

Jessica, I turned your writeup into a draft. I've inserted some questions for you as comments in the Word doc. I haven't run this by others at DOJ yet since I figured I should get your answers to those questions first.

Can you take a look and give me some quick thoughts? A [REDACTED]

[REDACTED] Have some general availability for a call the rest of today and most of tomorrow, thanks.

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Thursday, November 16, 2017 10:15 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Subject: Information for status report

Hi Tsuki,

Attached is some information that I hope will be helpful to you in preparing the status report due on Monday. If you have any questions, please let me know.

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 12/1/2017 6:05:20 PM
To: martin.mcdermott@usdoj.gov
Subject: Fwd: 5th Circuit Steam Brief for Your Review
Attachments: ENV_DEFENSE-#827067-v1-SWEPCO_NOV_22_2017_DRAFT_BRIEF.DOCX; ATT00001.htm

This is the version of the brief I sent to Steve for his review last Friday (I cleaned it up based on what you sent before thanksgiving). I know as of Wednesday he was almost done reviewing it and didn't have major comments. I am waiting to hear back from him now if he is done.

Jessica

Begin forwarded message:

From: "Zomer, Jessica" <Zomer.Jessica@epa.gov>
Date: November 24, 2017 at 3:38:38 PM EST
To: "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>
Cc: "Levine, MaryEllen" <levine.maryellen@epa.gov>
Subject: 5th Circuit Steam Brief for Your Review

Steve,

Attached is a draft brief that Martin McDermott prepared and Mary Ellen and I gave preliminary comments on already, which have been incorporated. The brief is due Friday, December 15, which is three weeks from today. It would be good to get your feedback earlier rather than later in case you have a major structural or other significant comments that we need to work out before we send it to David for his review. Hopefully we can give him plenty of time to review this too.

Thanks,

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/16/2017 3:14:31 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]; O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Subject: Information for status report
Attachments: Information for status report.docx

Hi Tsuki,

Attached is some information that I hope will be helpful to you in preparing the status report due on Monday. If you have any questions, please let me know.

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/1/2017 7:38:49 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
CC: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: legacy section with edits
Attachments: legacy argument with JHZ edits_rjjm.docx

Martin,

Here is the legacy wastewater section with OW's and my comments. There are some places where I'm suggesting you just leave in the text with the comments so that Mary Ellen can see the issue/comments before we decide how to resolve them.

Thanks,

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/8/2017 4:52:11 PM
To: Elizabeth Gentile [elizabeth.gentile@erg.com]; Jordan, Ronald [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b7b8e2766b3e4f29a86a3893d65023ff-RJordan]
Subject: follow up on steam record index

Title for Record Index: **"Administrative Record Index for EPA's Final Rule Postponing Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category."**

Description for Record Section 25: **"PETITIONS, ADMINISTRATIVE STAY OF 2015 STEAM ELECTRIC ELG RULE, FINAL RULE POSTPONING CERTAIN COMPLIANCE DATES IN THE 2015 STEAM ELECTRIC ELG RULE."**

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/15/2017 6:38:09 PM
To: Barsky, Seth (ENRD) [Seth.Barsky@usdoj.gov]
Subject: RE: Request for representation in new NOI against EPA under the ESA

Great, thanks, Seth.

From: Barsky, Seth (ENRD) [mailto:Seth.Barsky@usdoj.gov]
Sent: Wednesday, November 15, 2017 1:34 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Floom, Kristen (ENRD) <Kristen.Floom@usdoj.gov>; Flax, Meredith (ENRD) <Meredith.Flax@usdoj.gov>
Subject: RE: Request for representation in new NOI against EPA under the ESA

Jessica,

Sorry for the delay. We are assigning this to Kristen Floom in our office (202-305-0340) to be supervised by Meredith Flax (202-305-0404). Kristen has a brief going out today and one going out in another case next week, but will turn to this after that. Seth

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Wednesday, October 25, 2017 1:44 PM
To: Barsky, Seth (ENRD) <SBarsky@ENRD.USDOJ.GOV>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: Request for representation in new NOI against EPA under the ESA

Seth,

Attached is a letter from the Center for Biological Diversity stating its intent to sue the Agency in 60 days for the Agency's alleged failure to consult with the Services under the Endangered Species Act in connection with a rule published in September 2018 concerning the postponement of certain compliance dates in the 2015 Steam Electric Effluent Limitations Guidelines and Standards ("Delay Rule"). The Center claims that EPA's Delay Rule is a discretionary action on which consultation is required, and that the Rule will have adverse impacts on protected species as a result of its delay in pollutant discharge reductions otherwise expected under the 2015 rule.

I have been assigned to this case on behalf of the Water Law Office in EPA's Office of General Counsel. I can be reached at the number below.

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

From: O'Donnell, Jessica (ENRD) [mailto:Jessica.O'Donnell@usdoj.gov]
Sent: Wednesday, October 25, 2017 1:32 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>; Barsky, Seth (ENRD) <Seth.Barsky@usdoj.gov>
Subject: RE: New steam NOI

Jessica Z. - Since this is an ESA matter, you should send the request for representation to our Wildlife & Marine Resources Section. I'm copying Seth Barsky, the Section Chief.

Seth,
This NOI relates to a rule postponing deadlines in the steam electric effluent limitations guidelines rule. There

[REDACTED]
Martin McDermott is the EDS lead for the petitions.

Thanks,
Jessica

Jessica O'Donnell
Senior Counsel for Appellate Matters
Environmental Defense Section
202.305.0851

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Wednesday, October 25, 2017 1:15 PM
To: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>
Cc: McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: RE: New steam NOI

Can you help me figure out who I should send an email to requesting representation in this matter?

Thanks!
Jessica

From: O'Donnell, Jessica (ENRD) [mailto:Jessica.O'Donnell@usdoj.gov]
Sent: Tuesday, October 24, 2017 8:04 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>; Hoshijima, Tsuki (ENRD) <Tsuki.Hoshijima@usdoj.gov>
Subject: Re: New steam NOI

First I've heard of it. What is the EA that is referred to in the letter? [REDACTED]
[REDACTED]

We will share this with our Wildlife Section.

Sent from my iPhone

On Oct 24, 2017, at 7:14 PM, Zomer, Jessica <Zomer.Jessica@epa.gov> wrote:

Seen this?

Sent from my iPhone

Begin forwarded message:

From: "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>
Date: October 24, 2017 at 5:56:43 PM EDT
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "Levine, MaryEllen" <levine.maryellen@epa.gov>
Subject: steam NOI

We already had this, right? [REDACTED]
[REDACTED] (but you may have already done that).

Steve Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
202 (564-5488)

From: Veney, Carla
Sent: Tuesday, October 24, 2017 1:49 PM
To: Fotouhi, David <Fotouhi.David@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Subject: Emailing - 18-000-0574.pdf

This was sent to OGC as an fyi. Thanks.
<18-000-0574.pdf>

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 10/15/2018 4:28:10 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: Li, Ryland (Shengzhi) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7cf0eac9d34b446f88e03f8ec48274f1-Li, Shengzh]
Subject: FW: Steam 705 case -- reply in support of motion to dismiss as moot
Attachments: ENV_DEFENSE-#855181-v1-CWA_II_MTD_CA5_reply.DOCX

Tsuki,

Our "mootness expert" in OGC had a couple of minor edits and a good comment/question on the reply brief you sent us on Friday. I'm copying him here so he has the benefit of your thoughts directly in response to his feedback.

Thanks,
Jessica

From: Li, Ryland (Shengzhi)
Sent: Monday, October 15, 2018 12:23 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Simons, Andrew <Simons.Andrew@epa.gov>
Subject: FW: Steam 705 case -- reply in support of motion to dismiss as moot

Jessica, I sent the below and attached an hour ago. Please confirm receipt and let me know if you have questions. Thanks!

Regards,

Ryland

Ryland (Shengzhi) Li
Attorney-Adviser
U.S. Environmental Protection Agency
Office of General Counsel, Air and Radiation Law Office
tel: (202) 564-6787 | em: li.ryland@epa.gov | desk: WJC-N 7409G
mail: USEPA (2344A), 1200 Pennsylvania Ave. NW, Washington, DC 20460

From: Li, Ryland (Shengzhi)
Sent: Monday, October 15, 2018 11:25 AM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: Simons, Andrew <Simons.Andrew@epa.gov>
Subject: RE: Steam 705 case -- reply in support of motion to dismiss as moot

Jessica,

Please find my comments attached. I left a substantive comment toward the end for you to think about.

Regards,

Ryland

Ryland (Shengzhi) Li
Attorney-Adviser
U.S. Environmental Protection Agency
Office of General Counsel, Air and Radiation Law Office
tel: (202) 564-6787 | em: li.ryland@epa.gov | desk: WJC-N 7409G
mail: USEPA (2344A), 1200 Pennsylvania Ave. NW, Washington, DC 20460

From: Zomer, Jessica
Sent: Friday, October 12, 2018 9:23 AM
To: Li, Ryland (Shengzhi) <li.ryland@epa.gov>
Cc: Simons, Andrew <Simons.Andrew@epa.gov>
Subject: Fwd: Steam 705 case -- reply in support of motion to dismiss as moot

Ryland- here's the draft reply brief. I'd appreciate comments by noon Monday. Thanks!

Begin forwarded message:


From: "Hoshijima, Tsuki (ENRD)" <Tsuki.Hoshijima@usdoj.gov>
Date: October 12, 2018 at 7:33:03 AM EDT
To: "Zomer, Jessica" (<Zomer.Jessica@epa.gov>), "Levine, MaryEllen" (<levine.maryellen@epa.gov>), "O'Donnell, Jessica (ENRD)" (<Jessica.O'Donnell@usdoj.gov>)
Subject: Steam 705 case -- reply in support of motion to dismiss as moot

Here is a draft of the reply. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



Our deadline is next Tuesday.

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/8/2017 2:49:59 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: RE: Steam Electric CADC Postponement Rule -- draft motion to transfer
Attachments: Clean_Water_Action_motion_to_transfer_JHZ_meljm.doc

Hi Tsuki,

Attached are comments from EPA on the motion to transfer. These reflect comments from me, Mary Ellen, and Jan (in OW). Steve Neugeboren and David Fotouhi had no comments. Nice work!

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 06, 2017 5:49 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>
Subject: Steam Electric CADC Postponement Rule -- draft motion to transfer

Hi Jessica,

Here is a draft motion to transfer for the Postponement Rule "protective petition." Could you return comments from your team and your front office by COB Wednesday?

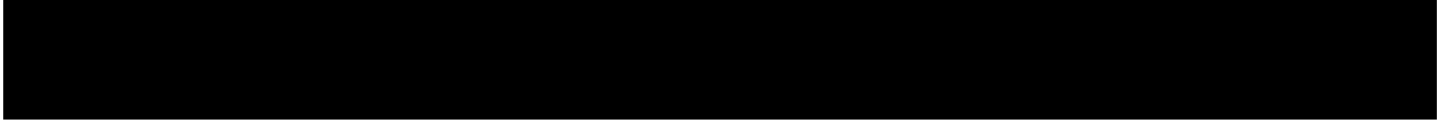
A
A
r

Thanks,
Tsuki

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message

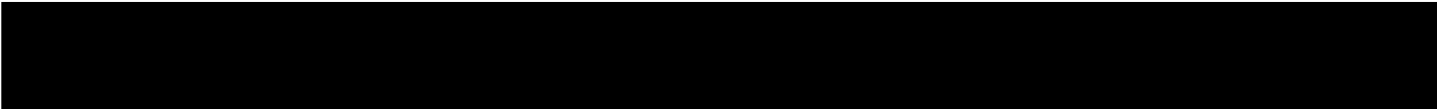
From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/7/2017 3:09:56 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: RE: Steam Electric CADC Postponement Rule -- draft motion to transfer



From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 06, 2017 5:49 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>
Subject: Steam Electric CADC Postponement Rule -- draft motion to transfer

Hi Jessica,

Here is a draft motion to transfer for the Postponement Rule "protective petition." Could you return comments from your team and your front office by COB Wednesday?



Thanks,
Tsuki

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/7/2017 3:06:38 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
Subject: RE: Steam Electric CADC Postponement Rule -- draft motion to transfer

Thanks, Tsuki. I have reviewed this and think it looks good – now I'm passing it on to others in EPA for their quick review.

I do imagine that the admin record will substantially overlap with the ones we filed in the 5th circuit and in the D.D.C. I will check with my clients about getting a certified index by Nov. 27 and get back to you.

Jessica

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 06, 2017 5:49 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>; McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>
Subject: Steam Electric CADC Postponement Rule -- draft motion to transfer

Hi Jessica,

Here is a draft motion to transfer for the Postponement Rule "protective petition." Could you return comments from your team and your front office by COB Wednesday?



Thanks,
Tsuki

Tsuki Hoshijima
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
202-514-3468
tsuki.hoshijima@usdoj.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/20/2017 9:11:29 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: RE: Record index for Postponement Rule Case (DC Cir.)

Yes, will do.

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 20, 2017 4:08 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Record index for Postponement Rule Case (DC Cir.)

Just change [REDACTED] in the final line of the first paragraph and I think that'll do just fine. Thanks!

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Monday, November 20, 2017 4:01 PM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Subject: RE: Record index for Postponement Rule Case (DC Cir.)

Tsuki,

Does this certification statement look okay. It was actually Jan who signed the 705 index, so I'd like her to do this one too.

Jessica

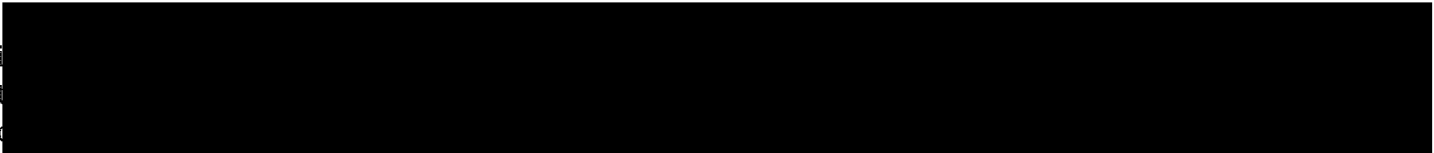
From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 20, 2017 3:25 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Record index for Postponement Rule Case (DC Cir.)

Thanks for all your work on this, Jessica. Will you be the one certifying the index? Let me know and I can send you a certification form to sign.

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Monday, November 20, 2017 9:54 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: Record index for Postponement Rule Case (DC Cir.)

Hi Tsuki,

[REDACTED]


O'Donnell can fill you in more on that if you have questions.

Please let me know at your earliest convenience whether you have any feedback on this that might require changes. I'm afraid my clients may not be available later this week if something comes up before our filing deadline on Monday.

Thanks!
Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/1/2017 4:51:39 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
CC: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: draft leachate section of brief
Attachments: leachate argument with JHZ jm.docx

Martin,

Attached are comments on the leachate section from me and two OW clients (Jan and Ron). Mary Ellen has not reviewed this version yet; she can do so when the whole brief gets put together. I am working through OW's comments on the legacy section now and hope to send them to you later today.

Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/20/2017 9:01:27 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: RE: Record index for Postponement Rule Case (DC Cir.)
Attachments: certification for postponement rule DC Cir. litigation.docx

Tsuki,

Does this certification statement look okay. It was actually Jan who signed the 705 index, so I'd like her to do this one too.

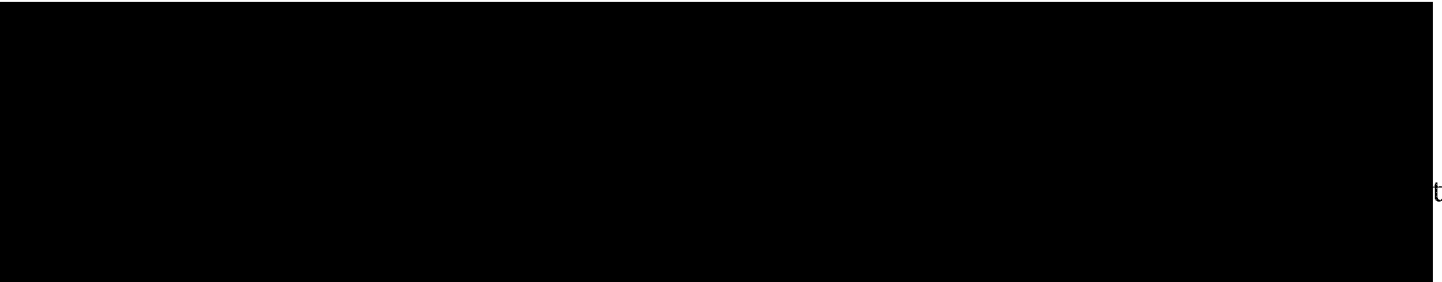
Jessica

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 20, 2017 3:25 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Record index for Postponement Rule Case (DC Cir.)

Thanks for all your work on this, Jessica. Will you be the one certifying the index? Let me know and I can send you a certification form to sign.

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Monday, November 20, 2017 9:54 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: Record index for Postponement Rule Case (DC Cir.)

Hi Tsuki,



O'Donnell can fill you in more on that if you have questions.

Please let me know at your earliest convenience whether you have any feedback on this that might require changes. I'm afraid my clients may not be available later this week if something comes up before our filing deadline on Monday.

Thanks!
Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460

Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/7/2018 9:41:41 PM
To: Lundman, Robert (ENRD) [Robert.Lundman@usdoj.gov]
Subject: Re: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

That's great thanks for the update, Bob.

On Nov 7, 2018, at 4:06 PM, Lundman, Robert (ENRD) <Robert.Lundman@usdoj.gov> wrote:

Hi all: plaintiffs-appellants are on board with a joint motion at least in theory; we will see what happens when they see the draft (see email below). Speaking of a draft, I will send one to you (hopefully a short one) no later than early next week. UWAG also sent a short email concurring with this approach (attached). Thanks!

Bob

From: Thomas Cmar <tcmar@[REDACTED]>
Sent: Wednesday, November 7, 2018 3:59 PM
To: Johnson, Harry M. Pete <pjohnson@[REDACTED]>; Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Cc: Bulleit, Kristy <kbulleit@[REDACTED]> McHugh, Timothy L. <TMcHugh@[REDACTED]>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Bob,

I've now had a chance to close the loop with everyone on Appellants' end, and we are in agreement with your proposal as well. Thanks for offering to take the lead on drafting a joint filing.

Best,

Thom

From: Johnson, Harry M. Pete <pjohnson@[REDACTED]>
Sent: Tuesday, November 6, 2018 6:36 PM
To: Lundman, Robert (ENRD) <Robert.Lundman@usdoj.gov>; Thomas Cmar <tcmar@[REDACTED]>
Cc: Bulleit, Kristy <kbulleit@[REDACTED]> McHugh, Timothy L. <TMcHugh@[REDACTED]>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Bob,

UWAG agrees with your proposal.

Thanks,

Pete

**Harry M. Johnson, III**

Partner

pjohnson@

bio | vCard

Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

HuntonAK.com

From: Lundman, Robert (ENRD) [mailto:Robert.Lundman@usdoj.gov]
Sent: Thursday, November 01, 2018 3:06 PM
To: Thomas Cmar; Johnson, Harry M. Pete
Cc: Bulleit, Kristy; McHugh, Timothy L.
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi all: the Fifth Circuit's ruling granting EPA's motion to dismiss the petition as moot (5th Cir. No. 18-60619) means that the parties in the DC Circuit appeal have to file motions to govern future proceedings by November 19. I thought it made sense to at least explore whether we can agree on a joint motion. It's EPA's position that the Fifth Circuit's ruling controls the mootness issue on appeal in the DC Circuit. As to the other issue, EPA thinks it makes sense to continue to hold the appeal in abeyance pending Fifth Circuit action in 18-60079. If we all agree on this, I'm happy to draft a short joint motion and circulate it. If it would be helpful to discuss this, that sounds good as well. Tomorrow is bad for me, but early next week is pretty open. Thanks!

Bob

From: Thomas Cmar <tcmar@>
Sent: Wednesday, June 20, 2018 11:41 AM
To: Johnson, Harry M. Pete <pjohnson@>
Cc: Bulleit, Kristy <kbulleit@> McHugh, Timothy L. <TMcHugh@>; Toth, Brian (ENRD) <BToth@ENRD.USDOJ.GOV>; Lundman, Robert (ENRD) <RLundman@ENRD.USDOJ.GOV>
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Hi Pete,

Thanks for your email on this. We are still pulling together a final version of the motion, but we do not intend to say anything about the impact of the Fifth Circuit decision beyond what I said in my original email below. I.e., that if the Fifth Circuit issues a decision on the merits of our Delay Rule claims, that would likely obviate the need for any further proceedings in the D.C. Circuit concerning those claims.

I've now heard from Bob that EPA will likely be filing a response to the motion, so at this point I think it's probably best for us to file and UWAG can decide whether it also wants to weigh in with the court. Based on your email, I plan to represent UWAG's position as, "UWAG takes no position and reserves the right to file a response after reviewing the motion." But please let me know if that's not an accurate representation.

We don't plan to file until later this afternoon, and I would be happy to talk before then if that would be helpful.

Best,

Thom

From: Johnson, Harry M. Pete <pjohnson@[REDACTED]>
Sent: Tuesday, June 19, 2018 11:10 AM
To: Thomas Cmar <tcmar@[REDACTED]>
Cc: Bulleit, Kristy <kbulleit@[REDACTED]> McHugh, Timothy L. <TMcHugh@[REDACTED]>
brian.toth@usdoj.gov; robert.lundman@usdoj.gov
Subject: RE: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

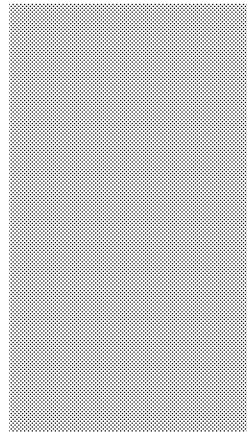
Thom,

UWAG has no objection to the concept of severing and holding in abeyance the issue regarding the district's court's denial of leave to amend and supplement. Can you clarify what you intend to say to the Court, if anything, about the impact of a 5th Circuit decision on the merits? That is, if the 5th Circuit upholds the jurisdiction of courts of appeals to rule on the merits of your claims about the postponement rule, do you intend at that point to return to the DC Circuit and argue otherwise?

In any event, as I say, we have no objection to severing and holding the issue in abeyance. I would, however, like to see the motion in advance before consenting, if that is feasible and agreeable. If not, you can represent that UWAG takes no position until it sees the motion.

Thanks,

Pete



Harry M. Johnson, III
Partner
pjohnson@[REDACTED]
p[REDACTED]
bio | vCard

Hunton Andrews Kurth
LLP
Riverfront Plaza, East
Tower
951 East Byrd Street
Richmond, VA 23219

HuntonAK.com

From: Thomas Cmar [mailto:tcmar@redacted]
Sent: Monday, June 18, 2018 7:49 AM
To: Johnson, Harry M. Pete; Bulleit, Kristy; McHugh, Timothy L.
Subject: Clean Water Action v. Pruitt, Case No. 18-5149 (D.C. Cir.)

Dear Counsel:

I am writing on behalf of Appellants in the above matter to confer concerning a procedural motion that we intend to make by this Wednesday, June 20.

We intend to request that the Court sever and hold in abeyance the issue in our appeal of the district court's denial of leave to amend and supplement our complaint to assert new claims challenging EPA's September 2017 rule delaying certain Effluent Limitation Guidelines compliance deadlines by two years (the "Delay Rule"). Our reason for seeking the abeyance is that, as you know, we are currently briefing the merits of the same claims in *Clean Water Action v. U.S. Environmental Protection Agency*, Case No. 18-60079 (5th Cir.).

We believe that holding our appeal of the jurisdiction issue in abeyance is appropriate pending the outcome of the Fifth Circuit proceeding is appropriate because, notwithstanding the district court's decision, the issue of whether district or appeals courts have original jurisdiction over the Delay Rule has not been finally resolved. For example, it is possible that the Fifth Circuit will, *sua sponte*, consider whether it has jurisdiction to review the Delay Rule and conclude that it does not, ruling instead that challenges to the Delay Rule must proceed in district courts. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction") (internal quotation marks and citation omitted). In addition, at least one other party is challenging the Delay Rule in district court; in that case, pending in the District of Arizona, there are pending motions concerning this same jurisdictional issue. *See Center for Biological Diversity v. Pruitt*, Case No. 4:18-cv-00050-TUC-JAS. However, if the Fifth Circuit issues a decision on the merits of Appellants' Delay Rule claims, that would likely obviate the need for any further proceedings in the D.C. Circuit concerning those claims.

Please note that we are seeking an abeyance of their appeal of the district court's holding on their Delay Rule claims only. We are also appealing the district court's holding that our claims challenging EPA's April 2017 administrative stay of the ELG rule are moot. We will request that the Court set a briefing schedule on that issue.

Could you let me know if UWAG will take a position on our motion to sever and hold in abeyance our appeal on the Delay Rule claims? The favor of your reply by Wednesday at 12:00 Eastern would be much appreciated.

Please feel free to give me a call on my cell if you would like to discuss this matter by phone.

Thanks,

Thom Cmar

Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301
[redacted]

The information contained in this email message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments.

*please consider the environment before printing

<mime-attachment>

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/20/2017 8:46:27 PM
To: Hoshijima, Tsuki (ENRD) [Tsuki.Hoshijima@usdoj.gov]
Subject: RE: Record index for Postponement Rule Case (DC Cir.)

No, it will likely be Rob Wood. He did it for the 705 index. Let me check to see his availability this week to sign.

From: Hoshijima, Tsuki (ENRD) [mailto:Tsuki.Hoshijima@usdoj.gov]
Sent: Monday, November 20, 2017 3:25 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Subject: RE: Record index for Postponement Rule Case (DC Cir.)

Thanks for all your work on this, Jessica. Will you be the one certifying the index? Let me know and I can send you a certification form to sign.

From: Zomer, Jessica [mailto:Zomer.Jessica@epa.gov]
Sent: Monday, November 20, 2017 9:54 AM
To: Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>
Cc: O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>; Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: Record index for Postponement Rule Case (DC Cir.)

Hi Tsuki,

A [REDACTED]
C [REDACTED]
t [REDACTED]
i [REDACTED]
i [REDACTED]
t [REDACTED]
c [REDACTED]

O'Donnell can fill you in more on that if you have questions.

Please let me know at your earliest convenience whether you have any feedback on this that might require changes. I'm afraid my clients may not be available later this week if something comes up before our filing deadline on Monday.

Thanks!
Jessica Hall Zomer

Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Mail Code 2355A, Washington, DC 20460
Tel. (202) 564-3376 | zomer.jessica@epa.gov

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/20/2017 7:06:31 PM
To: McDermott, Martin (ENRD) [Martin.McDermott@usdoj.gov]
CC: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Subject: RE: V2_WHITE_SWEPCO_EPA_RESPONSE_DRRAFT_BRIEF_NOV__14.docx
Attachments: Steam 5th Cir Brief First Draft_with JHZ and MEL comments.docx

Martin,

Here are some preliminary comments from me and Mary Ellen. Nothing major. We would like to send this to Steve for his review when you've had a chance to look over and incorporate these as appropriate.

Thanks!
Jessica

From: McDermott, Martin (ENRD) [mailto:Martin.McDermott@usdoj.gov]
Sent: Wednesday, November 15, 2017 1:39 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>
Cc: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>
Subject: V2_WHITE_SWEPCO_EPA_RESPONSE_DRRAFT_BRIEF_NOV__14.docx

JZ – attached is draft brief. Still could use a bunch more record cites and lots more polishing, but I want to get you started on it. McD

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 8/27/2018 2:44:35 PM
To: jessannehall@[REDACTED]
Subject: Fwd: Comments on brief?
Attachments: image001.jpg; ATT00001.htm; Steve's Comments on Brief.pdf; ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Hooks, Samantha" <hooks.samantha@epa.gov>
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>
Subject: RE: Comments on brief?

Here goes. . .

Samantha S. Hooks
Program Assistant
Office of General Counsel
Air and Radiation Law Office (ARLO)
Room 7340G
(202) 564-5569 (office)
(202) 564-5603 (fax)

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 8/27/2018 2:44:35 PM
To: JESSANNEHALL@[REDACTED] [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=568ff15823d5404ca69a3fa7c92f2490-JESSANNEHAL]
Subject: Fwd: Comments on brief?
Attachments: image001.jpg; ATT00001.htm; Steve's Comments on Brief.pdf; ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Hooks, Samantha" <hooks.samantha@epa.gov>
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>
Subject: RE: Comments on brief?

Here goes. . .

Samantha S. Hooks

Program Assistant

Office of General Counsel

Air and Radiation Law Office (ARLO)

Room 7340G

(202) 564-5569 (office)

(202) 564-5603 (fax)

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 8/27/2018 2:54:16 PM
To: Tsuki.Hoshijima@usdoj.gov
Subject: Fwd: Comments on brief?
Attachments: image001.jpg; ATT00001.htm; Steve's Comments on Brief.pdf; ATT00002.htm

Tsuki,

Attached are Steve's minor comments on the brief. I looked through them and they seem straightforward but if you have questions please let me know.

I know you want to run this through Jessica O. next. Can you let me know what your timing is for that and when you might have a next draft for me to circulate to our front office?

Thanks!
Jessica

Begin forwarded message:

From: "Hooks, Samantha" <hooks.samantha@epa.gov>
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "Neugeboren, Steven" <Neugeboren.Steven@epa.gov>
Subject: RE: Comments on brief?

Here goes. . .

Samantha S. Hooks
Program Assistant
Office of General Counsel
Air and Radiation Law Office (ARLO)
Room 7340G
(202) 564-5569 (office)
(202) 564-5603 (fax)

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 3/7/2018 12:26:23 PM
To: martin.mcdermott@usdoj.gov
CC: Benware, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4b2e011a22a44312a04299f118cc4d11-Benware, Richard]
Subject: Fwd: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation
Attachments: Data Excerpts from the Steam Electric Technical Questionnaire.pdf; ATT00001.htm

Martin,

Richard sent a pdf last night with excerpts from the database. [REDACTED]

Richard: is there a key that could also be excerpted with explanations for some of the fields in these tables?

Begin forwarded message:

From: "Benware, Richard" <Benware.Richard@epa.gov>
To: "Zomer, Jessica" <Zomer.Jessica@epa.gov>, "McDermott, Martin (ENRD)" <Martin.McDermott@usdoj.gov>, "Jordan, Ronald" <Jordan.Ronald@epa.gov>
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Jessica,

Since I know you guys really need this, here's the excerpts from our questionnaire that we relied on for that legacy wastewater table. I got the database down from tens of thousands of pages to just one thousand pages by limiting it to the relevant tables. There is a very simple cover page for the whole thing as well as a title page for each of the tables. I know that's still pretty long, so if you guys need it further curtailed please let me know first thing tomorrow morning and I'll see what we can do, but we did rely on each of these tables to some extent.

Best,
-Richard

-----Original Message-----

From: Zomer, Jessica
Sent: Tuesday, March 06, 2018 4:04 PM
To: McDermott, Martin (ENRD) <Martin.McDermott@usdoj.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>; Benware, Richard <Benware.Richard@epa.gov>
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Martin,

We are working on getting you something you can send to petitioners for the Survey Database citation in our brief that isn't burdensomely large. It may come late tonight or early tomorrow (Wednesday).

Jessica

-----Original Message-----

From: McDermott, Martin (ENRD) [mailto:Martin.McDermott@usdoj.gov]
 Sent: Tuesday, March 06, 2018 3:58 PM
 To: Zomer, Jessica <Zomer.Jessica@epa.gov>; Jordan, Ronald <Jordan.Ronald@epa.gov>
 Subject: FW: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

-----Original Message-----

From: Thomas Cmar [mailto:tcmar@[REDACTED]]
 Sent: Friday, March 2, 2018 6:05 PM
 To: Johnson, Harry M. Pete <pjohnson@[REDACTED]>; joshua.smith@[REDACTED] Mr. Matthew Gerhart: <megerhart@[REDACTED]>; Flora Champenois <fchampenois@[REDACTED]>; casey.roberts@[REDACTED]
 Cc: tgrever@[REDACTED]; njsmith@[REDACTED]; mbuchanan@[REDACTED] Hoshijima, Tsuki (ENRD) <THoshijima@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JODonnell@enrd.usdoj.gov>; Mr. John Andrew Sheehan: <jasheehan@[REDACTED]>; Sean Sullivan@[REDACTED] McHugh, Timothy L. <TMcHug@[REDACTED]>; Bulleit, Kristy <kbulleit@[REDACTED]>; McDermott, Martin (ENRD) <MMcDermott@ENRD.USDOJ.GOV>
 Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Hi all,

Following up on this email from yesterday, I'm attaching two Word documents here.

The first is an initial draft table of contents for the joint appendix. It has a separate entry for each document from the certified index we believe should be included in the appendix. Below each entry, there are notes from us in red as to which portions of the document we believe should be included.

The second document is a compiled list of citations from each of the relevant briefs concerning Environmental Petitioners' claims, which we used as the starting point for drafting the Table of Contents. I'm including this for your reference in case it's helpful in reviewing the draft TOC.

Please let us know if you have any changes to propose to the list of documents (and which portions of those documents) we propose to include in the joint appendix. I ask that you get back to us no later than COB next Tuesday 3/6 to allow for adequate time for us to prepare the joint appendix for filing.

I'm happy to talk next week if there is anything you would like to discuss by phone.

Thanks,

Thom

-----Original Message-----

From: Thomas Cmar
Sent: Thursday, March 01, 2018 3:30 PM
To: 'Johnson, Harry M. Pete'; joshua.smith@[REDACTED] Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; casey.roberts@[REDACTED] kathleen.krust@[REDACTED]
Lauren Hogrewe
Cc: tgrever@[REDACTED]; njsmith@[REDACTED]; mbuchanan@[REDACTED] Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; Sean.Sullivan@[REDACTED]
McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Hi Pete,

We are compiling the appendix and should have something ready for the parties to start reviewing by tomorrow. We don't have any questions about the citations in your brief. I did send a question to counsel for EPA yesterday about whether EPA wanted to include a lengthy spreadsheet cited in its brief in the joint appendix and am still waiting to hear back on that.

Thanks,

Thom

-----Original Message-----

From: Johnson, Harry M. Pete [mailto:pjohnson@[REDACTED]]
Sent: Thursday, March 01, 2018 3:03 PM
To: Thomas Cmar; joshua.smith@[REDACTED] Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; casey.roberts@[REDACTED] kathleen.krust@[REDACTED]
Lauren Hogrewe
Cc: tgrever@[REDACTED]; njsmith@[REDACTED]; mbuchanan@[REDACTED] Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; Sean.Sullivan@[REDACTED]
McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Tom,

Just following up to make sure environmental petitioners are not looking for anything from us for the joint appendix due next week. Our brief's citations should be pretty straightforward for inclusion in the JA.

Regards,

Pete

Harry M. ("Pete") Johnson, III
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Phone: [REDACTED]
Fax: (804) 343-4538

eMail: [pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])
website: www.hunton.com

-----Original Message-----

From: Thomas Cmar [[mailto:tcmar@\[REDACTED\]](mailto:tcmar@[REDACTED])]
Sent: Tuesday, February 20, 2018 11:14 AM
To: Johnson, Harry M. Pete; [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]); Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]); [kathleen.krust@\[REDACTED\]](mailto:kathleen.krust@[REDACTED]); [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])
Cc: [tgrever@\[REDACTED\]](mailto:tgrever@[REDACTED]); [njsmith@\[REDACTED\]](mailto:njsmith@[REDACTED]); [mbuchanan@\[REDACTED\]](mailto:mbuchanan@[REDACTED]); Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; [Sean.Sullivan@\[REDACTED\]](mailto:Sean.Sullivan@[REDACTED]); McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)
Subject: RE: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Thanks, Pete. We will be in touch after our reply brief is filed to touch base about the appendix (which is due on March 8).

-----Original Message-----

From: Johnson, Harry M. Pete [[mailto:pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])]
Sent: Tuesday, February 20, 2018 9:26 AM
To: Thomas Cmar; [joshua.smith@\[REDACTED\]](mailto:joshua.smith@[REDACTED]); Mr. Matthew Gerhart;; Gabrielle "Gabi" Winick; Flora Champenois; [casey.roberts@\[REDACTED\]](mailto:casey.roberts@[REDACTED]); [kathleen.krust@\[REDACTED\]](mailto:kathleen.krust@[REDACTED]); [adela.jones@\[REDACTED\]](mailto:adela.jones@[REDACTED])
Cc: [tgrever@\[REDACTED\]](mailto:tgrever@[REDACTED]); [njsmith@\[REDACTED\]](mailto:njsmith@[REDACTED]); [mbuchanan@\[REDACTED\]](mailto:mbuchanan@[REDACTED]); Hoshijima, Tsuki (ENRD); O'Donnell, Jessica (ENRD); Mr. John Andrew Sheehan;; [Sean.Sullivan@\[REDACTED\]](mailto:Sean.Sullivan@[REDACTED]); McHugh, Timothy L.; Bulleit, Kristy; McDermott, Martin (ENRD)
Subject: 15-60821 Southwestern Elec Power Co., et al v. EPA, et al: Joint Appendix Preparation

Counsel,

In advance of the deadline for filing the Joint Appendix, we wanted to check in to confirm environmental petitioners' plans for preparing it. Are you expecting anything from industry petitioners? Thanks.

Regards,

Harry M. ("Pete") Johnson, III
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Phone: [REDACTED]
Fax: (804) 343-4538
eMail: [pjohnson@\[REDACTED\]](mailto:pjohnson@[REDACTED])
website: www.hunton.com

Message

From: Zomer, Jessica [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A5C30484C1704EC79ADDF362BF776ED6-HALL, JESSICA]
Sent: 11/21/2017 1:04:45 PM
To: Tsuki.Hoshijima@usdoj.gov
CC: Jessica.O'Donnell@usdoj.gov
Subject: Fwd: record certification
Attachments: image2017-11-21-070903.pdf; ATT00001.htm

Tsuki,

Attached is a signed certification statement for the index.

Jessica

Begin forwarded message:

From: <DC-WJCW-6231-M@epa.gov>
Date: November 21, 2017 at 7:09:04 AM EST
To: <matuszko.jan@epa.gov>, <zomer.jessica@epa.gov>
Subject: record certification

Message

From: Fonseca, Silvina [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D77D07BE7386476380B9193170946863-FONSECA, SILVINA]
Sent: 1/5/2018 8:53:11 PM
To: 2017HQfirstassistants [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bdc9755e524f4ef9a58d1fdcabec028f-2017HQfirst]; 2017Regionfirstassistants [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ed821316d3eb411aac71542734b214e7-2017Regionf]; Allen, Reginald [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=799c3b0558e14130b17c66b2533548ba-Allen, Regi]; Baptist, Erik [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10fc1b085ee14c6cb61db378356a1eb9-Baptist, Er]; Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, El]; Bolen, Brittany [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=31e872a691114372b5a6a88482a66e48-Bolen, Brit]; Bowman, Liz [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c3d4d94d3e4b4b1f80904056703ebc80-Bowman, Eli]; Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]; Carroll, Carly [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0f7542bf469d41ecad7f7f6c7c46b8e7-Carroll, Carly]; Darwin, Henry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ae8e9d24eeb4132b25982e358efbd9d-Darwin, Hen]; Darwin, Veronica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bc98aaf2f15a466baede3dab0e27a35e-Darwin, Ver]; Davis, Patrick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7fca02d1ec544fbbbd6fb2e7674e06b2-Davis, Patr]; Dickerson, Aaron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d0440d9f06994021827e0d0119126799-Dickerson,]; Dravis, Samantha [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ece53f0610054e669d9dffe0b3a842df-Dravis, Sam]; Falvo, Nicholas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=424ac90ea7d8494a93209d14d37f2946-Falvo, Nich]; Flynn, Mike [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=735bf2d12a064b0998510511c5b4644b-MFlynn]; Silvina Fonseca [fonsecasly@cs.com]; Ford, Hayley [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4748a9029cf74453a20ee8ac9527830c-Ford, Hayle]; Grantham, Nancy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=12a3c2ed7158417fb0bb1b1b72a8cfb0-Grantham, Nancy]; Gulliford, Jim [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a3aa23ac3a36426495575d5dfd5a37c9-Gulliford,]; Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Hanson, Paige (Catherine) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=95adc1b2ac3b40ab9dc591801d594df8-Hanson, Cat]; Hupp, Millan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=92cac7b684b64f90953b753a01bee0d5-Hupp, Milla]; Jackson, Ryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=38bc8e18791a47d88a279db2fec8bd60-Jackson, Ry]; Kelly, Albert [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08576e43795149e5a3f9669726dd044c-Kelly, Albe]; Kime, Robin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ef7b76087a6475b80fc984ac2dd4497-RKime]; Lopez, Peter [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b7b64b3b2f984708840a5f342309d460-Lopez, Pete]; LUEHE, DOUGLAS [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=e4238e9d183f475b9ada394d51db6cf7-LUEHE, DOUG]; Lyons, Troy
 [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=15e4881c95044ab49c6c35a0f5eef67e-Lyons, Troy]; Sands, Jeffrey
 [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=b2aa28629ade4afb8d5ec12a8aaaba54-Sands, Jeff]; Schwab, Justin
 [/o=ExchangeLabs/ou=Exchange Administrative Group
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 [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=befdafc0fa1a425eae232f60ad9bda1d-Stepp, Cath]; Subramanian, Hema
 [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=65e089600e8b4724a2e85997849bd208-Subramanian, Hema]; Wagner,
 Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]; Wooden-Aguilar,
 Helena [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=991ab84f64be4b6b9dd10a68c81887b0-HAWodd]; Cortes, Emilio
 [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=59702e973eb445968c1aafbf994f41f0-Cortes, Emi]

Subject: Weekly for January 4, 2018

Attachments: Weekly Report 1.4.2018.docx

Good afternoon,

Attached please find the weekly for the week ending January 4, 2018. If you have any questions please let me know. Have a great weekend!

Silvina Fonseca
Special Assistant
Office of the Administrator
U.S. Environmental Protection Agency
Desk: 202.564.1955
Cell: 202.306.6844



Mercury Removal Advancements and Cost in the Coal-fired Power Plant Industry

Presented to the US Environmental Protection Agency

Dr. Regina Rodriguez

Chief Operating Officer - Carbonxt

December 3rd, 2018

MERCURY REMOVAL ADVANCEMENTS



- Legislation Uncertainty
 - MATS
 - ELG Postponement
- Impact on other Industries
 - Water treatment plants
- Carbonxt Technology Advancements
 - Hg removal in scrubber



MERCURY LEGISLATION UNCERTAINTY

- * MATS
 - o Sorbent Injection
 - o Coal Additives
 - o Existing controls optimization
- * Refined MATS compliance strategies that lead to:
 - o Improved efficiencies
 - o Lower operating costs and higher profits
 - o Lower or no use of halogens
- * Tax Credit Expiration
- * ELGs
 - o Lack of operational experience with certain target contaminants
 - o Will plants achieve compliance?
 - o Multi pollutant removal technology yet to be realized
 - o Impact of coal additives on water quality

BALANCING ACT FOR POWER PLANTS



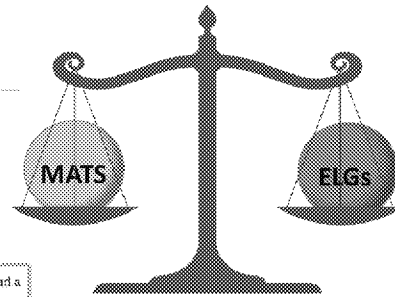
Coal Additives

- CaBr_2
- Used for Hg oxidation



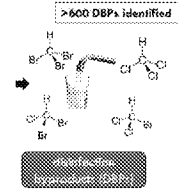
With help of coal tax credits, Mylan had a negative 294-percent tax rate in 2016

*See report dated 12/20/18 on Mylan's use of tax credits to offset tax liability.



Discharge

- Selenium oxidation
- High levels of Bromide at WTP



Mercury and Air Toxics Standards (MATS)

Effluent Limitation Guidelines (ELGs)

Air Phase

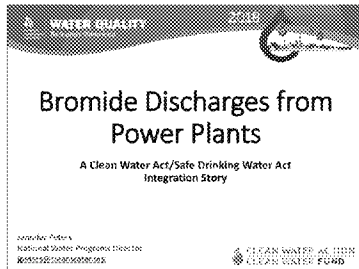
Water Phase

Mercury, Particulate Matter, HCl/SO_2 , HF

Mercury, Arsenic, Selenium, Nitrate/Nitrite



BROMIDE FROM POWER PLANT IMPACT DOWNSTREAM WATER TREATMENT FACILITIES



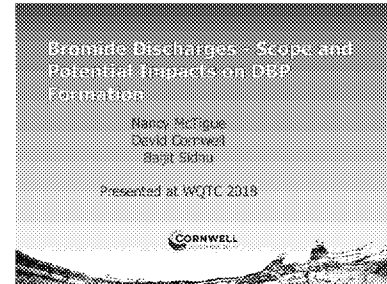
Building collaborative approaches for
NPDES permit-writers to address bromide



Adam Carpenter
Manager of Energy and Environmental Policy
American Water Works Association

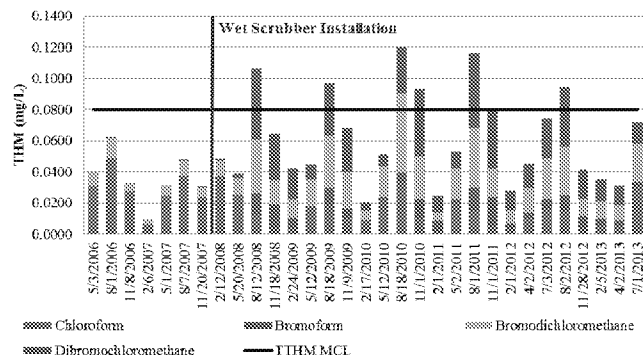
Jeanne M. VanBriesen, Ph.D., P.E.
Duquesne Light Company Professor
Civil and Environmental Engineering and Engineering and Public Policy
Carnegie Mellon University

Carnegie Mellon



Recent Special Topic Presentations at
AWWA- Water Quality Technology Conference
November 2018, Toronto, Canada

DISINFECTION BI-PRODUCTS AS A RESULT OF WET SCRUBBER UTILIZATION



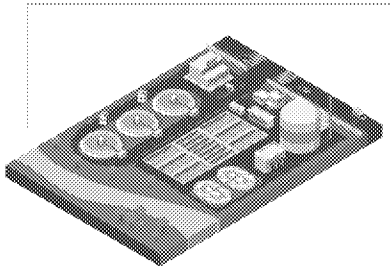
- Bromide can significantly increase DBP levels once it comes in contact with chlorine in water treatment plants
- The extent of the impact depends on how much of DBP is brominated, contact time and concentration

Cytotoxicity/Genotoxicity:

I-DBPs > Br-DBPs > Cl-DBPs

OXIDATION ADDITIVE IN THE WFGD

Affect balance of plant



- Brominated salts are water soluble and accumulate in the scrubber slurry.
- Discharged water will affect municipal water plants downstream.
- Halogens + Organic Matter = Trihalomethanes (THMs)
 - Limit for Total THMs = 0.08 mg/L
- Many power plants that discharge wastewater are completely eliminating the use of brominated products.

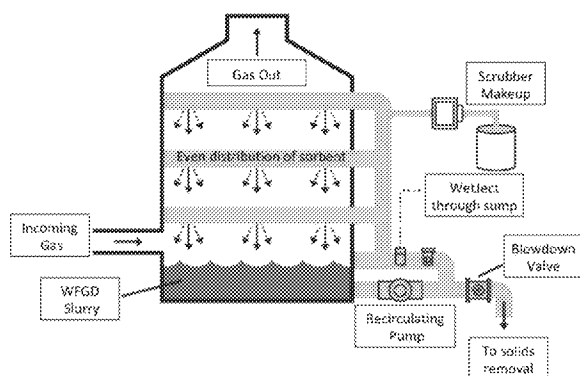


PROVEN ALTERNATE MATS COMPLIANCE STRATEGY

WFGD Catalytic Sorbent Injection

- Targets air phase and aqueous phase mercury
- Proprietary non-halogenated additive - capable of removing elemental and oxidized mercury
- Reduces/eliminates air phase injection of PAC
 - Lower CAPx
 - Lower OPx
- Eliminates the need for halogenated additives
 - Prevents corrosion
 - Decreases the selenium loading/oxidation in the WFGD
 - Reduces bromide discharge

WFGD CATALYTIC SORBENT INJECTION



- Recirculation within the scrubber allows longer contact time
- Concentration monitored through mass balance
- Low injection rates required
- **Potential replacement for:**
 - Air Phase PAC injection
 - CaSr_2/KI addition to coal
 - Sulfide scrubber additives



SCRUBBER INJECTION

Case Study 1



Unit: 500 MW – High Sulfur Bituminous Coal

- High Hg variation in coal; 0.1 – 0.5 ppm of Hg
- Brominated coal additive (CaBr_2) & WFGD sulfide additive for compliance
- Slow response time for sulfide scrubber additive put plant at risk of non-compliance



Confirmed
ability to
mitigate coal
Hg variations



Demonstrated
quick response
solution to high
Hg levels

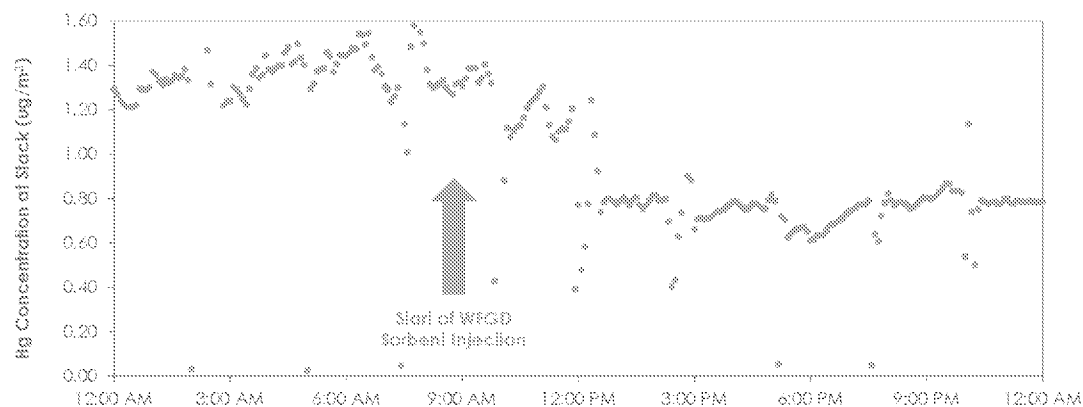


Low cost, low
maintenance,
easy
integration



No adverse
effects to plant
balance

SUCCESSFUL Hg REMOVAL RESULTS



- Station burns high Hg content coal (0.43 ppm)
- 60% decrease in elemental Hg of the stack with Wet FGD addition



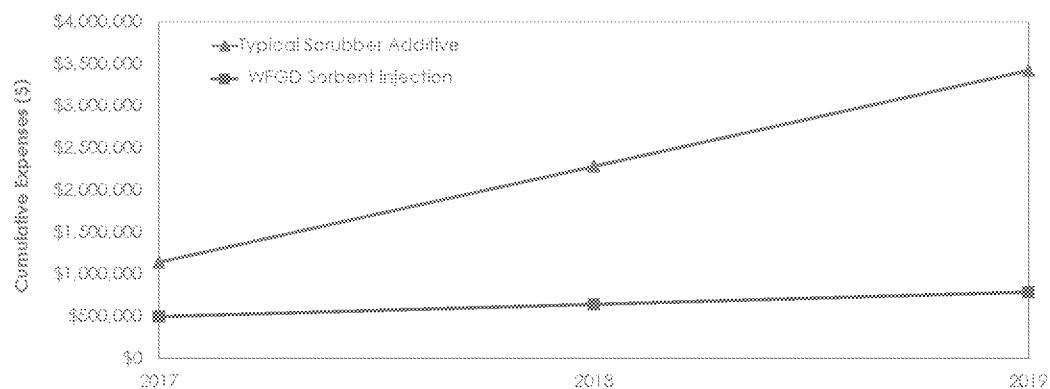
POSITIVE SCRUBBER RESPONSE

WFGD Slurry Analysis

COLLECTION POINT	PARAMETER	DAY 1 BASELINE	DAY 3 WETJECT
COAL	Hg Coal Content (ppb)	84	132
	Dissolved Hg (µg/L)	0.49	0.01
SLURRY EFFLUENT	ORP (mV)	224	192
	pH	6.14	6.25

- * Lower dissolved Hg concentration in the scrubber slurry below ELG limits, even with an increase in Hg coal content
- * No significant changes in pH or ORP – maintained scrubber operation
- * No impact to balance of plant

RE-EMISSION ADDITIVE vs. WFGD CATALYTIC SORBENT INJECTION Cost Comparison





SCRUBBER INJECTION

Case Studies - In Progress



Evaluating Sorbent Injection's ability to:

- Remove brominated coal additive for Hg compliance
- Have no impact on the balance of plant and gypsum sales
- Reduce slurry concentrations for Hg for proposed ELG limits



Compliance
maintained
without coal
additive



Five weeks of
continuous
injection

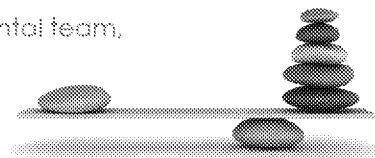


No adverse
effects to plant
balance

Specifics cannot be shared due to non-disclosure agreements

TAKE HOME MESSAGE

- Multiple strategies can be used for Hg removal
- Low cost alternatives can be used to achieve low contaminant discharge
- Holistic view of all components required to create a sound environmental control strategy
- Working alongside and with the plant's environmental team, providing technical insight is strongly required.





Thank you for your time!

Regina Rodriguez, PhD
Chief Operating Officer, Carbonxt
Ph: 352-378-4950
Cell: [REDACTED]
r.rodiguez@ [REDACTED]

On May 30, 2018, at 8:02 AM, McDonough, Kevin <Kevin.McDonough@ [REDACTED]> wrote:

Ron,

Please see the attached updated version of the Carbonxt portion of the presentation. Per David, this information would not be considered CBI; feel free to distribute to the remote office for today's discussion.

David also set up the following like as well to the native .ppt file if that works better [REDACTED]
[REDACTED]

Attendees will include David Mazyck and Regina Rodriguez from Carbonxt and myself.

I suggest the following agenda (+/-):

- 10:00am – 10:45am: Air Phase Hg Removal
- 10:45am – 11:30am: Aqueous Phase Hg Capture / Bromine Elimination / Selenium Removal
- 11:30am – 12:00pm: Ash WTD Market Update

We are planning on arriving at 9:30am to check in. If we need to be earlier, please let me know. Thank you.

Sincerely,

Kevin L. McDonough

Vice President, Sales & Marketing

United Conveyor Corporation | 2100 Norman Dr. West | Waukegan, IL 60085

P [REDACTED]

This electronic mail message and any attached files contain information intended for the exclusive use of the individual or entity to whom it is addressed and may contain information that is proprietary, privileged, confidential and/or exempt from disclosure under applicable law. If you are not the intended recipient, you are strictly prohibited from disclosing, copying, distributing or using any of this information. If you received this communication in error, please contact the sender immediately and destroy the material in its entirety.

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For more information please visit <http://www.mimecast.com>

<EPA Presentation_May 2018_Final.pdf>



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 10, 2014

OFFICE OF WATER

Ms. Michalene Reilly
Manager, Environmental Services
Hoosier Energy Rural Electric Cooperative
P.O. Box 908
Bloomington, IN 47402-0908

Dear Ms. Reilly:

We received the comments submitted by Hoosier Energy Rural Electric Cooperative (Hoosier) regarding EPA's proposed effluent limitations guidelines and standards (ELGs) for the steam electric power generating point source category (78 FR 34432). We are writing to you because we have concluded that based on review of the Hoosier comments and the Utility Water Act Group (UWAG) comments, which Hoosier endorses, additional information is either needed or would be useful in evaluating the comments with respect to fly ash and bottom ash wastewater characterization. In some cases, clarification is needed in order to properly interpret, validate, and evaluate the ash data submitted. We are therefore asking that you provide the information described below in order to ensure that the Agency appropriately considers your submission.

As you are aware, EPA is operating with a deadline for taking final action on the steam electric ELGs. We are thus requesting that any additional information you provide in response to this letter be received by EPA **no later than March 31, 2014**.

Information Requested from the Frank E. Ratts Generating Station

Hoosier Energy provided data on 32 samples of bottom ash and fly ash pond effluent collected between September 2008 and December 2009 at the Frank E. Ratts Generating Station for a Reasonable Potential to Exceed analysis of nine parameters for a permit renewal. Additionally, Hoosier provided data on 29 samples of fly ash pond effluent and 28 samples of bottom ash pond effluent collected for mercury analysis.

1. Please provide any fly ash or bottom ash transport water data (i.e., wastewater samples of the transport water prior to commingling or mixing with other wastestreams in the ash pond). Please provide paired source water sample data where available.
2. Please provide any fly ash and/or bottom ash pond effluent data collected since December 2009.
3. For the pond effluent data supplied in your comment letter, as well as any additional pond effluent data supplied in response to this request, please provide the Pond/Impoundment Unit IDs (e.g., SPD-2) from the 2009 EPA questionnaire for the ponds from which bottom ash and fly ash pond effluent samples were collected. Please provide the

dimensions for each pond, including surface area, depth, and residence time. Also, please identify what other wastestreams flow into each impoundment and their relative contributions.

4. For any fly ash or bottom ash transport water data collected, please provide the Pond/ Impoundment Unit ID (e.g., SPD-2) for the pond which fly ash or bottom ash transport water sampled would enter. Please provide the dimensions for this pond including surface area, depth, and residence time. Also, please identify what other wastestreams flow into this impoundment and their relative contributions.
5. Describe any solids separation processes and treatment procedures associated with fly ash and/or bottom ash transport water or pond effluent. For example, does the plant use dewatering bins to separate solids from the ash transport water? Please identify if these solids separation processes and/or treatment procedures are located upstream or downstream of the sample location.
6. Please identify what chemicals are added to the wastewater upstream of the sample location or to the sample during settling.
7. Please provide a more detailed description of the sampling method beyond "collected in accordance with Method 1669." Specify the location of the pond effluent samples provided (e.g., collected from pond overflow weir prior to entering discharge canal) and whether each sample was a grab or composite sample. Additionally, provide duration and frequency information for all composite sampling (e.g., 24-hour composite collected every hour).
8. How often is fly ash and bottom ash sluiced at the plant (provide both the daily frequency and duration for typical operating practices)? Please identify whether source water is continuously transferred to the ash pond even when fly ash and/or bottom ash are not being sluiced. Indicate whether samples were collected during periods when the bottom ash is not sluiced (i.e., source water is flowing through the sluice pipe).
9. Please indicate whether any significant discharges lie upstream of the plant's White River intake that may contribute to background levels of pollutants (i.e., mining/ excavation activities, facilities which discharge into the river).
10. Please provide additional details regarding the source water sampling locations:
 - a. Please specify the location of the source water samples provided and indicate whether the plant discharge is upstream or downstream of intake water location (i.e., does any of the plant's effluent contribute to intake water)?
 - b. Does the plant treat the intake water prior to use in the fly ash or bottom ash sluicing systems. If so, how is the intake water treated?
 - c. Does the plant recycle any process wastewater for use in the fly ash and/or bottom ash sluicing system. This includes any recycling of the pond effluent from the ash ponds. If so, how?
11. Please provide the associated TSS concentration for the source water, fly ash, and bottom ash samples.
12. Please provide the flow rate of the wastewater at the time of sampling, as well as the average annual bottom ash discharge flow rate. Please also provide sluice flow for all mercury results presented in Attachment 2 of your comment letter.
13. Describe any atypical operations occurring at the plant at the time of any sampling (e.g., test burn of new coal).

14. What basis was used for determination of atypical high pollutant levels from the White River which were excluded from calculations? Please indicate what may have caused such high levels in the White River water column during these sampling periods.
15. What basis was used for determination of improper handling or analyses of the water samples by the contractor which were excluded from calculations?

Information Requested from the Merom Generating Station (Plant ID 03719)

Please provide the same data and supporting details as detailed above for the Merom Generating Station.

Attachment 1 provides guidelines for submitting analytical data (and supplemental information) under this request.

We appreciate your help in providing the information described above in a timely manner. If you have any questions, please do not hesitate to call me at 202-566-1003.

Sincerely,

A handwritten signature in dark ink, appearing to read 'PPJL', is positioned above the printed name.

Ronald P. Jordan
Engineering and Analysis Division

ATTACHMENT 1

Guidelines for Submitting Analytical Data for the Steam Electric Power Generating Effluent Guidelines Rulemaking

This document provides guidance regarding the submission of analytical data in response to the proposed Steam Electric ELGs, including the type of supplemental information that should be provided along with any analytical data, in order to ensure that EPA can use the data to inform its analyses for the final action. The data you submit should reflect typical operating conditions and be representative of properly operating treatment systems.

Data you submit should be relevant to **fly ash transport water, bottom ash transport water, or ash pond effluent**.

Important Considerations

- The data provided should include both treated and untreated wastewater.
- Samples should be collected prior to commingling the wastewater with any other wastestreams.
- For wastewater collected from surface impoundments or other systems containing multiple types of wastes, the wastewater should comprise at least 75% of the influent wastewater volume and influent pollutant mass loading. Furthermore, the data submitted should specifically identify all sources of wastewater and the estimated contribution to wastewater volumes and pollutant loadings.
- Pollutant data should be collected using sufficiently sensitive, EPA-approved analytical methods in 40 CFR Part 136 appropriate for the pollutant concentrations present in the wastewater.

Data Submission Format and Criteria

To facilitate EPA's analysis and use of the analytical data, the data should be submitted using the format provided in the Microsoft Excel Workbook titled "Analytical Data Table." The Analytical Data Table workbook provides the content, structure, and format for the analytical data submission. Included within the workbook are two separate spreadsheets. The spreadsheet titled "Data Table Structure" provides the table for entering the analytical data. Included in the table are three example entries to provide some context of how to populate each of the fields in the table. Additionally, the spreadsheet titled "Field Descriptions" describes each field included in the table. Provide the individual sample results associated with the sampling locations. Entries that average multiple results for a sampling point are of limited use. The following is the information that should be provided for each individual sampling result, as applicable (see the "Field Descriptions" spreadsheet for more details):

- Plant Survey ID (from the *Questionnaire for the Steam Electric Effluent Guidelines*);
- Plant Name;

- Date Sample Collected;
- Analyte (for metals, including whether it is total recoverable or dissolved);
- CAS Number;
- Analytical Method;
- Type of Sample Collected (e.g., grab, 24-hour composite);
- Type of Sample Analyzed (e.g., total recoverable, dissolved)
- Units;
- Non-Detect Indicator;
- Concentration;
- J-Value Concentration;
- Detection Limit;
- Reporting Limit;
- Dilution Factor;
- Qualifiers;
- Qualifier Description;
- Wastestream represented by result;
- Flow rate; and
- Sample point description.

For EPA to evaluate whether the data provided are valid and of sufficient quality for use in the loadings analyses and/or limitations development, the following supplemental information should accompany any submitted analytical data, as applicable:

- Plant Survey ID (from the *Questionnaire for the Steam Electric Effluent Guidelines*);
- Plant Name;
- SE Unit IDs associated with each sample (based on responses to the *Questionnaire for the Steam Electric Effluent Guidelines*);
- Chemicals and dosages added to the treatment system, including location of injection points;
- Process flow diagram of the system sampled, including identifying the specific sample locations for which data are being provided;
- Identify the date when the system began operating;
- Description of all wastestreams that contribute to the sample location and the associated contribution from each wastestream (e.g., percent of flow contribution); and
- Identification of whether any data or supplemental information submitted to EPA is considered confidential business information.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

October 30, 2014

Thomas Effinger
SCANA
220 Operations Way
Mail Code: C221
Cayce, SC 29033-3701

Dear Mr. Effinger:

The U.S. Environmental Protection Agency ("EPA"), under the authority of the Clean Water Act, as amended (the "Act"), 33 USC 1251 et seq., proposed revisions to the effluent limitations guidelines and standards ("ELGs") for the steam electric power generating point source category on June 7, 2013. EPA received the comments submitted by SCANA regarding the proposed ELGs on September 20, 2013. Those comments discuss a pilot treatment technology program that was implemented at SCANA's Wateree station in June 2013, and they present some results from the program. Based on our review of SCANA's comments, as well as those of the Utility Water Act Group ("UWAG"), which SCANA expressly endorses, we have concluded that additional information is needed to evaluate the data provided in SCANA's comments, as well as comments with respect to flue gas desulfurization ("FGD") wastewater characterization and treatment.

Thus, pursuant to Section 308 of the Act, 33 U.S.C. 1318, EPA requests that you provide the Agency with all FGD wastewater and pilot-scale FGD wastewater treatment data that was collected from SCANA's Wateree Station during the pilot testing program referenced in the comments. The following identifies EPA's specific requests/questions related to the pilot tests conducted at SCANA's Wateree Station.

1. Please identify when the pilot test was conducted.
2. Please identify and describe the objectives of the pilot test.
3. Please provide a description of the wastewater used in the pilot testing (e.g., describe any treatment of the FGD wastewater prior to it being transferred to the technologies evaluated as part of the pilot testing).

4. Please describe any changes made to the pretreatment configuration/operations during the pilot testing and when these changes occurred. For example, describe any additional pretreatment steps that were added prior to the wastewater being transferred to the pilot-test technologies. Include a detailed description of the pretreatment technology (or changes to the technology) including chemicals and dosage rates, and the date the changes were made. For any changes made to the pretreatment system, provide an explanation as to why the changes were made.
5. Please provide a description of all the wastewater treatment technologies evaluated as part of the pilot testing, including all biological (e.g., GE's ABMet, Infilco's iBio) and other treatment systems (e.g., chemical precipitation, ion exchange, ultrafiltration, vapor-compression evaporation, zero valent iron) including chemicals and dosage rates. Please also note any changes made to the treatment technologies or additional pretreatment added by the vendors to the systems during the pilot testing to optimize performance of the technology. For any changes made to the treatment technologies, provide an explanation as to why the changes were made and identify the date the changes were made.
6. Please identify the amount of wastewater treated through each of the treatment technologies (including any pretreatment system(s)) and note any changes throughout the pilot test duration. For any changes in the wastewater flow rate treated, please explain why there was an increase/decrease in the flow rate.
7. Please identify any wastestreams or dilution streams that were/are commingled with the FGD wastewater prior to treatment technologies. Identify the percent contribution of the other wastestreams/dilution streams compared to the FGD wastewater that was/is treated in the pilot test.
8. Please provide a simplified process flow diagram of the entire pilot test configuration that identifies the generation of the FGD wastewater, any pretreatment systems, and all technologies evaluated. Please note that this simplified diagram should identify the operation of the pilot test before and after any changes were made and the date changes were made should be noted on the diagram. See Enclosure 1 for an example of a simplified process flow diagram.
9. Please provide a detailed process flow diagram for each wastewater treatment technology evaluated as part of the pilot testing including any vendor installed pretreatment steps starting with the wastewater supplied to the vendor by AEP. The diagram should show all the specific sampling locations and chemical addition points

for that technology. Please note that each diagram should include specific sampling location names so the analytical data can be matched specifically to each technology evaluated. See Enclosure 1 for an example of a detailed process flow diagram.

10. EPA requests that SCANA provide all arsenic, mercury, selenium, nitrate/nitrite, and ammonia concentration data for the following wastestreams for the entire time period that the pilot test was conducted (see Enclosure 2 and Attachment 1 (“Analytical Data Table” workbook) for details on providing the analytical data):
 - a. FGD purge stream (e.g., prior to any treatment or dilution);
 - b. FGD purge intermediate - Primary (e.g., FGD purge after first pretreatment step);
 - c. FGD purge intermediate - Secondary (e.g., FGD purge after second pretreatment step);
 - d. FGD purge intermediate – Tertiary (e.g., FGD purge after third pretreatment step);
 - e. FGD purge intermediate – Quaternary (e.g., FGD purge after fourth pretreatment step);
 - f. Influent to pilot testing (e.g., after all pretreatment, but before treatment in the technologies evaluated in the pilot test); and
 - g. Treated wastewater from each technology evaluated (Note: If any technologies are operated as treatment trains (i.e., one technology is downstream of another technology) then the data for each stage in the treatment train should be provided).
11. Additionally, EPA requires certain supplemental information to further evaluate the quality of the data. Please provide the data listed in Enclosure 2.
12. Please provide the type and source of coal (i.e., mine name and location) used at the plant each day starting one month prior to the beginning of the pilot test and continuing through the entire pilot test duration. In addition, please provide the sulfur and chlorine content of the coal used at the plant for each day of this period, if available. For days where coal blending occurred, please note the percentage of each type of coal used. See Attachment 2 (Supplemental Data workbook, tab titled “Coal Data”) for the format of the data requested by EPA.
13. Please provide the following information for each day within the range of sampling results that are being provided, if available (See Attachment 2 Supplemental Data workbook):
 - a. Chloride concentration, pH, total suspended solids (TSS), and average daily oxidation-reduction potential (ORP) values within the FGD scrubber system (tab titled “FGD System Information”);
 - b. Chloride concentration, pH, TSS, and average daily ORP values for the FGD

- purge stream (prior to any treatment) (tab titled "FGD Purge Stream");
- c. Chloride concentration, pH, TSS, and average daily ORP values for the influent to pilot testing (e.g., after initial treatment, but before treatment in the technologies evaluated in the pilot test) (tab titled "FGD WWT Influent"); and
- d. Electric generation output (MW-hr) for each generating unit serviced by a FGD system (tab titled "Electricity Generation").

Additionally, EPA requests that you identify all other pilot tests conducted between January 1, 2010 and the present that evaluated the treatment of FGD wastewater at Wateree Station or any other SCANA power plants. For each of the additional pilot test identified, you must provide the following information:

- Where was the test conducted;
- When was the test conducted;
- What technologies were evaluated (company and technology); and
- What were the objectives of the test?

The information and data responsive to the items above should be received by EPA **no later than November 21, 2014**. EPA has determined that it requires such information and data in order to assist with the development of its revised steam electric ELGs, and the Agency is under a consent decree to sign a decision taking final action on the rulemaking by September 30, 2015. The Agency also believes that all the information and data requested is readily available to SCANA, and thus EPA's request is reasonable. You must provide the information and data to EPA pursuant to the federal law cited above. Moreover, it is in your best interest to ensure that any information on which EPA may base its regulations presents an accurate and representative picture of the industry. We appreciate your cooperation in providing all the information and data requested. Please be advised legal action, resulting in penalties, could be taken against you should you fail to fully cooperate with this request.

Enclosure 1 of this letter provides example process flow diagrams that should be provided in response to this request. Enclosure 2 of this letter provides details regarding how the analytical data and supplemental information should be provided to EPA. Enclosure 3 of this letter provides the statutory authority on which this request is based and explains your legal rights to protection of confidential business information. Enclosure 4 is a notice of EPA's intention to allow selected contractors access to all information, including confidential information that you submit. EPA will make your information available to EPA contractors to the extent they need such information to carry out any work required by their contracts. As noted in Enclosure 4, if you wish to comment on this action, any such comment must be received in writing by EPA within 10 days of your receipt of this notice. Please send these comments to the address listed in Enclosure 4.

If you have any questions or concerns, please contact Phillip Flanders via e-mail at flanders.phillip@epa.gov or by phone at 202-566-8323.

We appreciate your help in providing the information described above in a timely manner.

Sincerely,

A handwritten signature in black ink, appearing to read "R. K. Wood", written over a horizontal line.

Robert K. Wood, Director
Engineering & Analysis Division (4303T)

Enclosures

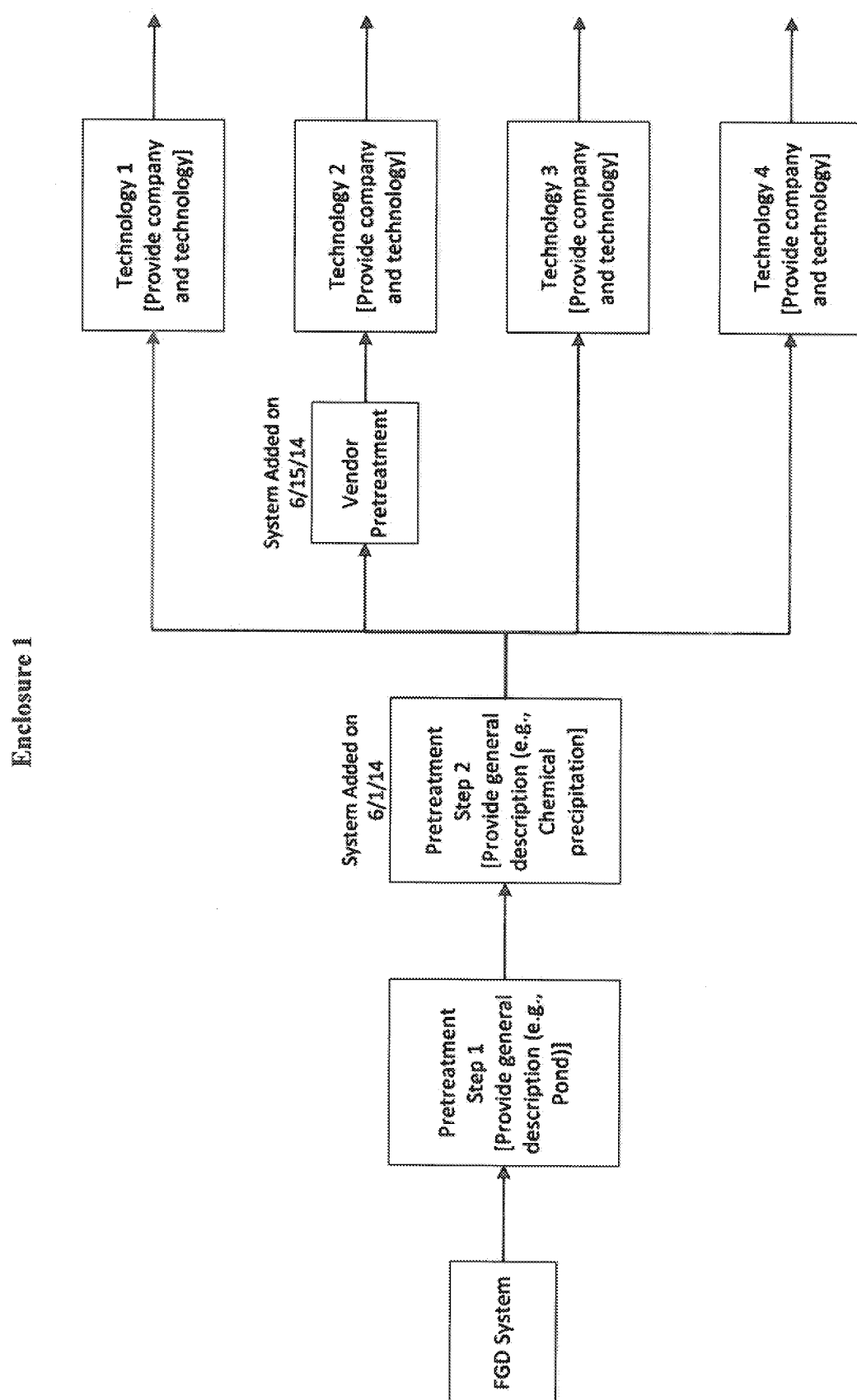


Figure 1. Example Simplified Process Flow Diagram for Pilot Test Configuration

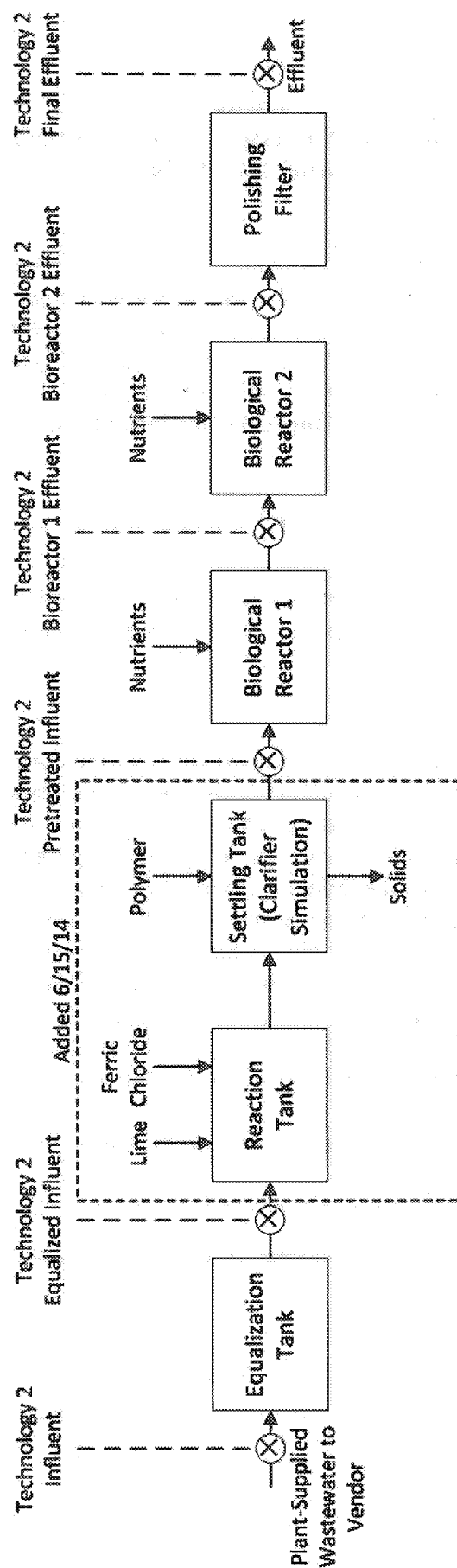


Figure 2. Example Detailed Process Flow Diagram for Pilot Test Technology

Enclosure 2

Guidelines for Submitting Analytical Data for the Steam Electric Power Generating Effluent Guidelines Rulemaking

This document provides guidance regarding the submission of analytical data in response to the proposed Steam Electric ELGs, including the type of supplemental information that should be provided along with any analytical data, in order to ensure that EPA can use the data to inform its analyses for the final action. The data you submit should reflect typical operating conditions and be representative of properly operating treatment systems.

Data you submit should be relevant to **flue gas desulfurization wastewater**.

Important Considerations

- The data provided should include both treated, partially treated, and untreated wastewater.
- Pollutant data should be collected using sufficiently sensitive, EPA-approved analytical methods in 40 CFR Part 136 appropriate for the pollutant concentrations present in the wastewater.

Data Submission Format and Criteria

To facilitate EPA's analysis and use of the analytical data, the data should be submitted using the format provided in the Microsoft Excel Workbook titled "Analytical Data Table." The Analytical Data Table workbook provides the content, structure, and format for the analytical data submission. Included within the workbook are two separate spreadsheets. The spreadsheet titled "Data Table Structure" provides the table for entering the analytical data. The spreadsheet titled "Example Data Table" includes three example entries to provide some context of how to populate each of the fields in the data table. Additionally, the spreadsheet titled "Field Descriptions" describes each field included in the data table. Provide the individual sample results associated with the sampling locations. Entries that average multiple results for a sampling point are of limited use. The following is the information that should be provided for each individual sampling result, as applicable (see the "Field Descriptions" spreadsheet for more details):

- Plant Survey ID (from the *Questionnaire for the Steam Electric Effluent Guidelines*);
- Plant Name;
- Date Sample Collected;
- Analyte (for metals, including whether it is total recoverable or dissolved);
- CAS Number;
- Analytical Method;
- Type of Sample Collected (e.g., grab, 24-hour composite);
- Type of Sample Analyzed (e.g., total recoverable, dissolved)
- Units;
- Non-Detect Indicator;
- Concentration;

- J-Value Concentration;
- Detection Limit;
- Reporting Limit;
- Dilution Factor;
- Qualifiers;
- Qualifier Description;
- Wastestream represented by result;
- Flow rate; and
- Sample point description.

For EPA to evaluate whether the data provided are valid and of sufficient quality for use in the loadings analyses and/or limitations development, the following supplemental information should accompany any submitted analytical data, as applicable:

- Chemicals and dosages added to the treatment system, including location of injection points (see Attachment 2 (Supplemental Data workbook, tab titled "Chemical Dosages");
- Laboratory reports associated with the sampling data; and
- Identification of whether any data or supplemental information submitted to EPA is considered confidential business information.

Enclosure 3

Legal Authority

This request for information is made under authority provided by Section 308 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1318. Section 308 provides, in part, that, "Whenever required to carry out the objective of this Act, including but not limited to . . . developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act . . . the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods . . . , (iv) sample such effluents . . . , and (v) provide such other information as [she] may reasonably require."

Confidentiality

A business ("you") may not withhold information from EPA on the grounds that it is confidential. You may, however, if you desire, assert a business confidentiality claim covering part or all of the information that you furnish to EPA.

EPA regulations concerning confidential business information are contained in 40 CFR Part 2, Subpart B. The manner of asserting such a claim is specified in 40 CFR 2.203(b). Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in Subpart B.

If you wish to claim as confidential any of the information covered by the enclosed request, you must do so at the time you submit the information to EPA. If no such claim accompanies the information when EPA receives it, EPA may make the information available to the public without further notice to you.

EPA will notify you in the event that a request is made for release of information that you have claimed to be confidential or EPA otherwise decides to make a determination as to whether or not such information is entitled to confidential treatment. At that time, EPA will request that you substantiate any claim you have made that information is confidential. Therefore, we encourage you to consult 40 CFR Part 2, and to claim as confidential only those items that you truly believe satisfy the criteria for confidentiality.

Note that effluent data are not eligible for confidential treatment (see 40 CFR 2.302).

Enclosure 4**Notice of Intent to Transfer Confidential Information to Selected EPA Contractors**

EPA intends to grant access to any confidential information collected as part of the steam electric effluent guidelines rulemaking to selected EPA contractors.

In accordance with 40 CFR Sections 2.301(h)(2-3), 2.302(h)(2-3), and 2.305(h)(2-3), EPA may allow those contractors identified below access to all data (including data claimed to be confidential) collected as part of this data request. Transfer of this information to these contractors is necessary in order for the contractors to assist EPA in performing technical, statistical, and environmental analyses to support the development of effluent limitations guidelines and standards for the Steam Electric Power Generating industry.

The contractors and subcontractors that will be providing support to EPA during the development of these regulations are listed below:

EPA Office Receiving Support	Contractor Name	EPA Contract No.	Type of Support
Office of Water/ Office of Science & Technology/ Engineering & Analysis Division	Eastern Research Group, Inc.	EP-C-12-021	Engineering analysis
	Westat	EP-C-10-023	Statistical analysis

EPA has determined that it is necessary to transfer the information described above to the designated contractors and subcontractors in order that they may carry out the work required by their contracts. The contracts contain all provisions necessary to implement the confidentiality regulations (see 40 CFR 2.301(h)(2), 2.302(h)(2), and 2.305(h)(2)).

In accordance with these confidentiality regulations, you are entitled to provide comments to EPA regarding this notice of contemplated disclosure. Any such comments must be received by EPA in writing within 10 days of your receipt of this notice. Please send such comments to:

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USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Mail Code: 4303T
Washington, DC 20460
flanders.phillip@epa.gov